89-1880

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED FREIGHTWAYS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 4, 1990

QUESTION PRESENTED

1. In determining whether an employer's backpay liability is reduced by losses wilfully incurred by a discharged employee, may the Board abandon any inquiry into the validity of the employee's reasons for rejecting a reinstatement offer, solely because the offer contained a condition unknown to the employee when he refused it and unrelated to the refusal.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, Charles Hennessey, the charging party, appeared below in the initial proceedings before the Board and the court of appeals.

The corporate identities and relationships of petitioner, its parent, and the non-wholly-owned subsidiaries thereof are listed in the Appendix (App., *infra*, 79a-80a).

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Consolidated Freightways petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The most recent opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 892 F.2d 1052. The supplemental decision and order of the National Labor Relations Board (NLRB or Board) (App., *infra*, 16a-26a), on earlier remand from the court of appeals, are reported at 290 N.L.R.B. No. 85. The original opinion of the court of appeals remanding the case to the Board (App., *infra*, 27a-42a) is reported at 669 F.2d 790. The original decision and order of the Board (App., *infra*, 43a-47a) are reported at 253 N.L.R.B. 988. The decision of the administrative law judge (App., *infra*, 48a-74a) is also reported at 253 N.L.R.B. 988.

JURISDICTION

The opinion of the court of appeals (App., *infra*, 1a) was entered on December 29, 1989,[1] and a timely petition for rehearing with suggestion for rehearing *en banc* was denied by the court of appeals on March 5, 1990. (App., *infra*, 75a-76a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(c) (App., *infra*, 77a-78a), concerning the remedial power of the National Labor Relations Board.

STATEMENT

The petitioner (employer) discharged a union-represented employee. Pursuant to the exact terms of a final and binding arbitration award resolving the employee's grievance, the employer offered the employee reinstatement to his prior position, with full seniority and health and welfare benefits, but without backpay and with a "final warning letter." The discharged employee, who was admittedly unaware of the warning letter term of the award when he responded to the employer's offer, flatly refused the apparently unconditional offer of reinstatement, expressly stating that he would not return to work unless he received backpay—a condition which the employee could not lawfully place on his reinstatement under this Court's decisions.

The employee subsequently filed an unfair labor practice charge with the Board and, after a hearing, an administrative law judge ordered full reinstatement, without the warning letter and with backpay, finding that the employer's previous reinstatement offer, rejected by the employee, did not toll backpay or a second reinstatement offer, since it was rendered conditional by

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[1] Judgment was entered on the same date for mandate purposes only.

the absence of back pay and by the warning letter requirement of the award. The employer appealed to the Board, which held that the offer had not tolled backpay or reinstatement, solely because of the warning letter term, found by the Board to be an invalid condition on the offer.

The employer petitioned for review of the Board's order, citing long-standing precedent that conflicted with the Board's decision. The court of appeals denied enforcement, remanding the case to the Board for explanation and clarification of the rule it was applying to the case. On remand, the Board overruled its long-standing rule, relied upon by the employer, that an employer's backpay liability is tolled when an employee rejects an offer of reinstatement without knowledge of, and regardless of, the conditionality of the offer. The Board held that, in assessing the tolling claim, it will no longer make any inquiry into an employee's reasons for refusing to accept an apparently valid reinstatement offer, if the offer is subsequently found not to be "facially valid." Thus, if the offer is subsequently found to be conditional and therefore invalid, then no examination of the employee's reasons for rejecting the offer will be conducted, even if the employee was not aware of the condition at the time of his refusal, and even if the employee's reason was unlawful and unrelated to the condition.

Upon review, the court of appeals enforced the Board's order. The petitioner seeks review of this decision, which is in conflict with this Court's decisions and which it believes presents an important and recurring question.

1. The petitioner is engaged in the intrastate and interstate transportation of freight by truck. On March 22, 1979, the employment of driver Charles Hennessey (employee or Hennessey) was terminated as the result of a dispute regarding the safety of a truck. Hennessey filed a grievance under the applicable collective bargaining agreement and, on May 1, 1979, petitioner was ordered by an arbitration panel to reinstate Hennessey with full seniority and health and welfare benefits, but without

backpay and with a "final warning letter." Petitioner immediately complied with the award and offered Hennessey reinstatement, but Hennessey, who testified he was completely unaware of the warning letter term of the award, App., *infra*, 3a, 17a-18a, 39a-41a, flatly rejected the apparently unconditional reinstatement offer, expressly stating that he would not accept any reinstatement offer that did not include backpay. App., *infra*, 2a-3a, 28a-29a, 38a-39a, 68a.

2. Ten (10) weeks later, Hennessey filed an unfair labor practice charge alleging a violation of the NLRA. On July 30, 1980, an administrative law judge ruled that Hennessey's discharge violated the NLRA and that the reinstatement offer, made pursuant to the arbitration award, did not toll the petitioner's backpay or reinstatement liability. App., *infra*, 3a-4a, 28a-30a. The administrative law judge did not consider Hennessey's state of mind and invalid reason for rejecting the offer, since he found petitioner's offer to be conditional due to the lack of backpay and the warning letter term, citing no authority for his decision. App., *infra*, 68a-69a.

3. The petitioner appealed to the Board, but on January 5, 1981, the Board upheld the administrative law judge. The Board found, however, that the prior reinstatement offer had been rendered conditional solely by the warning letter required under the arbitration award, and not by the lack of backpay. App., *infra*, 44a. The Board ordered petitioner to offer reinstatement with full backpay to Hennessey once again.

4. The employer petitioned for review of the Board's order on the question whether the previous reinstatement offer tolled any backpay or reinstatement liability, relying on *Research Designing Service, Inc.*, 141 N.L.R.B. 211 (1963); *L. Ronney & Sons Furniture Manufacturing Co.*, 97 N.L.R.B. 891 (1951), *enforced as modified*, 206 F.2d 730 (9th Cir. 1953), *cert. denied*, 346 U.S. 937 (1954); *Hribar Trucking, Inc.*, 166 N.L.R.B. 745 (1967), *enforced in part*, 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 N.L.R.B. 601 (1963), *enforced*, 340 F.2d 607 (1st Cir. 1965), *cert. denied*, 381 U.S. 951 (1965); and *Ekco Products Co.*, 117 N.L.R.B. 137 (1957). These

cases all required an examination of the employee's state of mind and reasons for rejecting an apparently unconditional, pre-adjudication reinstatement offer, in order to determine whether the employee would have turned down the offer of reinstatement even if it had not contained an invalid condition, and applied tolling when the employee rejected an offer of reinstatement without knowledge of the conditionality of the offer. App., *infra*, 36a-37a.

5. On December 11, 1981, the court of appeals denied enforcement of the Board's order, and remanded the case to the Board because of the Board's "failure to reconcile its decision in this case with its precedent, and its failure to explain its reason for abandoning any inquiry into the reason why a conditional offer is refused." App., *infra*, 41a. The court of appeals instructed the Board to "explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper." App., *infra*, 41a.

6. On July 29, 1988, the Board issued its supplemental decision on remand. App., *infra*, 16a. The Board discussed its long line of pre-adjudication decisions, sought to distinguish some, overruled others and, on the basis of its decision in *Leroy W. Craw, d/b/a Craw & Son*, 244 N.L.R.B. 241 (1979), *enforced*, 622 F.2d 579 (3d Cir. 1980), announced that it would no longer examine an employee's reasons for refusing a reinstatement offer if the offer is subsequently found to be conditional. App., *infra*, 18a-21a.

7. The court of appeals treated the Board's order as the promulgation of a "new rule," and enforced it, after expressly finding the Board's treatment of its own precedent, in which the employee's perception of the reinstatement offer had always been examined, to be "unpersuasive," App., *infra*, 7a, and the Board's new rule to be a "substantial departure" from existing law. App., *infra*, 12a-13a.[2] The court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc*. App., *infra*, 75a-76a.

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[2] The court of appeals approved the retroactive application of the new rule in this case to the date of the administrative law judge's

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether, in determining if an employer's backpay liability is reduced by losses wilfully incurred by a discharged employee, the Board may abandon any inquiry into the validity of the employee's reasons for rejecting a reinstatement offer, solely because the offer contained a condition unknown to the employee when he refused it and unrelated to the refusal.

The Board's new rule abandons any inquiry into an employee's state of mind or reasons for refusing a reinstatement offer, even if the inquiry is to determine whether the employee even had knowledge of the conditionality of the offer when he rejected it, or to determine whether the employee rejected the offer *solely* for an invalid reason (here, the absence of backpay) wholly unrelated to any condition in the offer, or to the employee's knowledge of such condition. (In this case, Hennessey rejected any offer of reinstatement that did not include backpay, in ignorance of and regardless of its conditionality). This new rule is plainly irrational and inequitable in application, and is not entitled to deference from the courts, because it conflicts directly with this Court's decision in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), holding that an employer is not obligated to provide backpay for any period when a discharged employee wilfully incurs losses in compensation. *NLRB v. Financial Institution Employees*, 475 U.S. 192, 202 (1986). The court of appeals decision grants excessive deference to the Board's new rule, which broadly excuses the employee from mitigating his damages

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(footnote continued from preceding page)

decision, even though (1) that decision neither examined existing precedents nor suggested a new rule; (2) the Board did not suggest a new rule or even cite the *Craw* case in its first decision; and (3) the court of appeals remanded the case to the Board precisely because it could not ascertain what the Board was trying to do in its 1981 decision. The new rule was not even arguably articulated until the Board's supplemental decision in 1988.

before any dispute has even been presented to the Board, and which ignores the undisputed fact in this case that the proximate cause of the employee's lack of work after May 1, 1979 was his wilful refusal of *any* reinstatement offer devoid of backpay, a condition he could not legally place on accepting re-employment. The Board's new rule is punitive and exceeds the Board's remedial authority, since the wilful loss doctrine of *Phelps Dodge* compels an examination of the employee's state of mind and reasons for declining the reinstatement offer when it was made.[3] This is an important issue which is likely to recur in *all* workplaces, including unionized settings, where compromise arbitration awards, requiring some form of corrective discipline along with reinstatement, are in fact commonplace, and many employers will face the same dilemma as petitioner if the Board's new rule excusing pre-adjudication mitigation by employees is enforced. *See* Elkouri & Elkouri, *How Arbitration Works*, 688-707 (Fourth Edition, 1985) and 134, 139-45 (1985-87 Supp.). Further review of the court of appeals decision is therefore warranted.

1. a. It is the touchstone of this case that the Board's authority is remedial, and not punitive. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). It is also axiomatic that wrongfully discharged employees are required to accept interim reinstatement offers without backpay to satisfy their affirmative obligation to mitigate their losses, pending resolution of the labor dispute. *See Phelps Dodge*, 313 U.S. at 199-200. *Cf. Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) (Title VII claimants are subject to the statutory duty to mitigate damages,

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[3] Furthermore, the condition found in the reinstatement offer in this case resulted from good faith adherence to a final and binding arbitration award, and, when viewed in context, was a *de minimis* burden on the employee's terms of reinstatement *Cf. Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (reinstatement offer lacking retroactive seniority not encumbered by condition in Title VII context). If the Board's rule must stand, such good faith and circumstances should be an exception to the penalizing result of the application of the Board's new rule. App., *infra*, 12a.

which is rooted in an ancient principle of law), *quoting from* C. McCormick, *Handbook on the Law of Damages*, 127-158 (1935). *See also, Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901 (1984) (the Board is required to give due consideration to the employee's responsibility to mitigate damages in fashioning an equitable backpay award).

In *Phelps Dodge*, this Court held that losses wilfully incurred by employees must be deducted from amounts owed them. 313 U.S. at 197-98. Wilfulness, by definition, requires an analysis of an employee's state of mind, the reasons and motivation for action. The Board's new rule directly conflicts with *Phelps Dodge*, which compels an analysis of the employee's reasons for refusing reinstatement. The Board's new rule is not a reasonable or permissible interpretation of its remedial authority under the NLRA because it utterly disregards the employee's reasons for refusing the offer, the very basis for any examination of wilfulness.

b. The bizarre and punitive effect of the Board's jettisoning of any inquiry into the employee's reasons for rejecting an apparently unconditional offer of reinstatement could not be clearer than in the present case. Here, the arbitration award-mandated condition on the employee's reinstatement—the warning letter unknown to Hennessey when he rejected the offer, and only subsequently found by the Board to be an invalid condition on the offer—had nothing whatsoever to do with the employee's refusal to return to work. Hennessey wilfully refused to work solely because the offer lacked backpay, a condition he could not lawfully place on his working. The employee's own, wilful, improper action was the proximate cause of his unemployment after May 1, 1979, since, even if the reinstatement offer had not "facially" included a warning letter, he would not have returned to work. The Board's new rule blindly ignores this real reason for the employee's continuing "losses," thereby conflicting head-on with the wilful loss doctrine of

Phelps Dodge and punishing the petitioner for the employee's unequivocal imposition of an impermissible condition on his return to work. In sharp contrast to the new rule, in all of the Board cases relied on below by petitioner the decision to toll backpay turned precisely on the employee's individual awareness of the terms of the reinstatement offer, and it was considered essential by the Board to focus on the terms of the offer as perceived by the employee, because it is precisely the employee's willingness to fulfill his duty to mitigate that must be examined under *Phelps Dodge.*

c. The Board bases its new rule, and the "facial validity" test therein, on its decision in *Leroy W. Craw, d/b/a Craw & Son, supra,* whose facts and rationale are totally inapposite to a pre-adjudication context. The conditional offer of reinstatement in *Craw* violated an express, *post*-adjudication order of the Board, issued pursuant to a finding, after evidentiary hearing, of illegal conduct by the employer. In contrast, pre-adjudication offers are made so that the parties can resume their relationship, mitigate their damages and maintain industrial peace and stability pending resolution of any continuing labor dispute. The *Craw* rule applies the premise that employers already adjudicated by the Board to be in violation of the Act ought not be allowed to take advantage of conditional reinstatement offers in order to toll their liability for their proven unfair labor practices, thereby effectively defying the Board's processes. In sharp contrast, at the time the petitioner offered Hennessey reinstatement pursuant to the terms of the arbitration award, it had not been adjudged a violator of the Act (a charge was only filed ten weeks after the award), was merely complying in good faith with the award, and was offering the discharged employee an opportunity to mitigate his damages. An employee's express refusal to work now and mitigate his damages pending resolution of any dispute he subsequently may raise to the Board should not be condoned.

d. The Board's refusal to examine an employee's wilfulness, *i.e.*, state of mind, for refusing an apparently unconditional reinstatement offer, because of the invalid condition subsequently found in the offer, is punitive, not remedial. By arbitrarily raising the "facially valid" hoop, the Board approves the conduct of employees who would not mitigate their damages and returned to work, even if the offer was not conditional. To require the employer to make such employees whole is indeed punitive, not remedial.

2. The Board's new rule in the present case is unreasonable and not entitled to deference from the courts. The court of appeals decision deferring to the Board is mistaken in two respects.

a. First, it does not reconcile the Board's new rule with this Court's decision in *Phelps Dodge*. Under the new rule, no examination of the employee's wilfulness in rejecting the offer is undertaken by the Board. An employee can refuse an offer he perceives to be unconditional for an unlawful reason unrelated to any condition actually in the offer, but still be rewarded with full backpay. In this respect, the rule is punitive, not remedial.

b. Second, the Board's new rule does not distinguish between pre-adjudication and post-adjudication contexts. The adoption of the rule disrupts the notion of industrial peace wherein the parties should mitigate their damages and abide by arbitration awards pending the resolution of any dispute before the Board. The new rule rewards employees who refuse to accept reinstatement offers for unlawful reasons unrelated to any apparent or subsequently determined condition in them. The Board's new rule is not a well-reasoned policy and should be rejected. Further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 4, 1990

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 25, 1989 Decided December 29, 1989

No. 88-1630

CONSOLIDATED FREIGHTWAYS, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Jeffrey L. Madoff, with whom *James D. Shepherd* and *Fred S. Sommer* were on the brief, for petitioner.

Charles Donnelly, Attorney, National Labor Relations Board ("NLRB"), of the Bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom *Aileen A. Armstrong*, Deputy Associate General Counsel, NLRB, and *William M. Bernstein*, Attorney, NLRB, were on the brief, for respondent. *Peter D. Winkler*, Attorney, NLRB, also entered an appearance for respondent.

Before WALD, *Chief Judge*, and BUCKLEY and SENTELLE, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Consolidated Freightways petitions for review of a supplemental decision of the National Labor Relations Board affirming an earlier Board decision that ordered Consolidated to reinstate a former employee with full backpay because its previous reinstatement offer had been conditional and therefore invalid. On review of the original decision, we noted the Board's failure to reconcile its decision with its own precedent and remanded with instructions that the Board explain the circumstances, if any, that would permit an inquiry into an employee's reasons for refusing a reinstatement offer. *Consolidated Freightways v. NLRB*, 669 F.2d 790 (D.C. Cir. 1981).

Consolidated contends that the Board has failed to comply with our remand instructions. Although we find the Board's treatment of its precedent unconvincing, we hold that the Board has complied with our remand by announcing a new rule: An employer's reinstatement offer must be unconditional on its face in order to terminate the accrual of backpay liability, regardless of the employee's reasons for declining the offer. We also hold that, as a matter of equity, Consolidated is liable to its former employee for backpay only from the date the Administrative Law Judge articulated the new rule.

I. BACKGROUND

A. Factual Background and the Board's First Decision

Consolidated Freightways is engaged in the business of intrastate and interstate transportation of goods and materials by truck. Charles Hennessey was hired by Consolidated as a truck driver in 1977. Two years later, on March 22, 1979, Consolidated discharged Hennessey after he refused to drive a tractor that he believed to be unsafe. Hennessey filed a grievance challenging his discharge and requesting reinstatement with full backpay and health and welfare benefits. On May 1, 1979, the grievance was heard before the Joint State Committee, an arbitration panel established under the collective bargaining agreement between

Consolidated and Hennessey's union. *Consolidated Freightways*, 253 N.L.R.B. 988, 990-94 (1981). The parties later stipulated that Hennessey's grievance was covered by the collective bargaining agreement; that Consolidated, the union, and Hennessey had agreed to be bound by the Committee's decision; and that the entire grievance and arbitration procedure was fair and regular in all respects. *Id.* at 994.

After hearing the arguments of the parties, the Committee ordered that Hennessey be reinstated to his former job with full seniority and benefits, but without backpay, and that a "final warning letter" be placed in Hennessey's file. *Id.* Under the terms of the collective bargaining agreement, Consolidated may not suspend or discharge an employee until at least one warning notice of the particular complaint at issue has been given (except for drug and alcohol use and certain other causes for discharge). Warning letters remain in effect for a maximum of nine months. Thus if he had accepted the offer, Hennessey would have been subject, for a limited period, to immediate discharge if he again engaged in the conduct for which he was first dismissed. Hennessey did not learn about the warning letter until well after he had refused an offer of reinstatement from Consolidated, explaining that he would not return without backpay.

On July 11, 1979, Hennessey filed an unfair labor practice charge with the NLRB. After a hearing, an Administrative Law Judge ("ALJ") found that Consolidated had discharged Hennessey for engaging in protected activity in violation of section 8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) (1982). 253 N.L.R.B. at 995. The ALJ declined to defer to the arbitration award because by putting Hennessey "under the gun of a 'warning letter,'" the award "fails to remedy the alleged unfair labor practices." *Id.* at 994. The ALJ then determined that Consolidated's obligation to reinstate Hennessey "continues until a proper offer of reinstatement is made." *Id.* Asserting that the accrual of backpay liability is not terminated until a valid, unconditional reinstatement offer is

made, the ALJ ordered that Hennessey be offered unconditional reinstatement with full backpay. *Id.* at 995.

Consolidated filed exceptions to the ALJ's conclusion that its reinstatement offer was conditional, but not to his finding that Consolidated had engaged in an unfair labor practice or his refusal to defer to the arbitration award. *Id.* at 988 n.1. In a Decision and Order dated January 5, 1981, the Board agreed that the warning letter had rendered Consolidated's reinstatement offer conditional, and therefore invalid, and affirmed the ALJ's decision. *Id.* at 988.

B. This Court's First Decision

Consolidated petitioned this court for review, arguing that its reinstatement offer was unconditional and thus terminated the accrual of backpay liability. Furthermore, Consolidated claimed that as Hennessey had refused the offer for an admittedly invalid reason (the denial of backpay), he was not entitled to either a second reinstatement offer or accrued backpay. The Board countered that as the offer was conditioned on the issuance of the warning letter, it was invalid; and as it was a nullity, Hennessey's invalid reason for refusing the offer did not toll the accrual of backpay liability.

On December 11, 1981, we remanded the case for reconsideration. *Consolidated Freightways*, 669 F.2d at 798. In our decision, we found that the Board had "failed to take account of Board precedent that emphasizes the actual reasons why an employee refuses an offer of reinstatement even when the validity of the offer itself is challenged." *Id.* at 795-96. We also cited *Research Designing Service, Inc.*, 141 N.L.R.B. 211 (1963), *L. Ronney & Sons Furniture Mfg. Co.*, 97 N.L.R.B. 891 (1951), *enforced as modified*, 206 F.2d 730 (9th Cir. 1953), *cert. denied*, 346 U.S. 937 (1954), and other cases in which the Board had held "that an employer's backpay liability is tolled when an employee rejects an offer of reinstatement without knowledge of the conditionality of the offer." 669 F.2d at 796.

We acknowledged, however, that the Board might have been relying on a more recent case, *Leroy W. Craw,* 244 N.L.R.B. 241 (1979), *enforced,* 622 F.2d 579 (3d Cir. 1980), which held that an invalid conditional offer of reinstatement did not toll the employer's backpay liability even though the employees had rejected the offer for reasons other than the invalid conditions. 669 F.2d at 796 & n.12. Faced with potentially conflicting precedent, we observed that *Leroy W. Craw* could either "signal a change of Board policy abandoning any inquiry into the reasons why a conditional offer is refused" or be "reconcilable with earlier Board precedent." *Id.* at 797. We therefore remanded the case to allow the Board "to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper." *Id.* at 798. We did not reach two other questions that had been presented; namely, whether the offer to Hennessey was in fact conditional and whether Consolidated's good faith reliance on the arbitration award would be sufficient in itself to toll backpay liability. *Id.* at 792 n.4, 798 n.15.

C. The Board's Supplemental Decision and Order

Six years later, in July 1988, the Board issued a Supplemental Decision and Order affirming its prior decision. 290 N.L.R.B. No. 85 (July 29, 1988) ("Supplemental Decision"). The Board stated that because Consolidated was required to file the warning letter, its offer "would not have returned [Hennessey] to the position he occupied before the discrimination against him." Accordingly, it was "clearly conditional on its face" and therefore invalid. *Id.* at 4. Under the circumstances, Hennessey was under no obligation to respond. The Board concluded that where an offer is invalid on its face, an employee's reasons for refusing it are irrelevant. *Id.* at 5.

The Board distinguished *Research Designing* and other cases cited by this court on the ground that in each instance the reinstatement offer was facially valid while in the present case

"reinstatement was expressly premised on the terms of the arbitration award, which contains the invalid condition." *Id.* Addressing *L. Ronney,* the Board said it could not determine whether the reinstatement offer was valid on its face. But to the extent that the case suggests that the NLRB will examine a wrongfully discharged employee's reasons for declining a facially invalid reinstatement offer, the Board overruled *L. Ronney* and any other similar case, stating that it adhered to its holding in *Leroy W. Craw Id.* at 6.

Finally, the Board reaffirmed its conclusion that the arbitration award, which it found to be "repugnant to the Act," was void and did not warrant deferral. Therefore, Consolidated's offer was judged by the Board's normal standards. As Hennessey had not received "a facially valid offer of reinstatement," the Board concluded that he was entitled to full backpay. *Id.* at 8-9.

II. DISCUSSION

This case concerns the Board's authority under section 10(c) of the Act "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]," in the event the Board finds that an employer has engaged in an unfair labor practice. 29 U.S.C. § 160(c) (1982). The Board's remedial authority under this section is extremely broad. Accordingly, its actions are entitled to a high degree of deference by this court, and a remedial order must stand "unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *St. Francis Fed'n of Nurses & Health Professionals v. NLRB,* 729 F.2d 844, 849 (D.C. Cir. 1984) (quoting *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540 (1943)); *see also Fibreboard Corp. v. NLRB,* 379 U.S. 203, 216 (1964) (describing remedial power of Board as "a broad discretionary one, subject to limited judicial review").

A. Did the Board Act Arbitrarily and Capriciously and Fail to Comply with this Court's Remand Instructions?

Consolidated's chief complaint is that the Board acted arbitrarily and capriciously (and failed to comply with this court's instructions on remand) because when it held that Consolidated's offer did not toll the accrual of backpay liability, the Board did not provide a convincing explanation for abandoning the rule established in *Research Designing* and its progeny. Consolidated argues that the Board's attempt to distinguish its precedent was disingenuous at best and that it failed to explain its rationale for abandoning any inquiry into the reasons why an employee has refused a reinstatement offer.

We agree that the Board's attempts to reconcile and distinguish its precedents are unpersuasive. The Board claims that *Research Designing* and the other cases cited by us are distinguishable from the one before us because the offers in those cases appeared to be unconditional and thus were facially valid. Supplemental Decision at 5. Unfortunately, that distinction is nowhere discussed in either *Research Designing* or any of the other cases cited; in fact, in each instance the Board explicitly refers to the employee's perception of the reinstatement offer in determining whether the offer tolled the company's backpay liability. *See Hribar Trucking, Inc.*, 166 N.L.R.B. 745, 756 n.19 (1967), *enforced in part*, 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enforced*, 340 F.2d 607 (1st Cir.), *cert. denied*, 381 U.S. 951 (1965); *Ekco Prods. Co.*, 117 N.L.R.B. 137, 150, 152 (1957).

Moreover, the Board made no attempt to reconcile its decision in *L. Ronney*. Faced with a case that could not readily be distinguished from the one before us, the Board simply overruled *L. Ronney* and similar cases to the extent that they support an inquiry into an employee's reasons for declining a facially conditional offer. The Board explained only that it would follow its previous decision in *Leroy W. Craw*. Supplemental Decision at 6.

While we reject the Board's attempts at reconciliation, we conclude that in reality it has simply enunciated a new rule

based on its earlier decision in *Leroy W. Craw*—which (as Consolidated conceded at oral argument) the Board has the authority to do. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (Board has "informed discretion" to "announc[e] new principles in an adjudicative proceeding."). Accordingly, we now assess the adequacy of the reasons given by the Board in support of its new policy.

As the Board has explained, reinstatement is "a public right granted to vindicate the law against one who has broken it." *Lipman Bros., Inc.*, 164 N.L.R.B. 850, 853 (1967). Its purpose is to restore a wrongfully discharged employee to the same situation he would have been in had he not been discharged. *Id.; see also NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-65 (1969). To that end, the Board has long held that an offer of reinstatement must be "firm, clear, and unconditional. Only when a proper offer is made and unequivocally rejected by the employee is the employer relieved of his statutory duty to reinstate." *Lipman Bros., Inc.*, 164 N.L.R.B. at 853.

In reaffirming its earlier order, the Board reasoned that a conditional reinstatement offer may not be recognized for any purpose because to do so would allow the employer to continue to discipline the wronged employee for having engaged in a protected activity. As the equities lie with the wrongfully discharged employee, the Board concluded that it is

> incumbent on the Respondent to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer. Anything short of this is inconsistent with the statutory policy that a transgressor should bear the burden of the consequences stemming from its illegal acts.

Supplemental Decision at 6-7.

In challenging the Board's position, Consolidated cites the undisputed rule that discharged employees must accept reinstatement offers without backpay in order to preserve the employer's right to litigate the lawfulness of the discharge and

argues that it should be applied in this case. *See National Screen Prods. Co.*, 147 N.L.R.B. 746, 748 (1964). That rule recognizes that if an employer were required to offer an employee reinstatement with backpay prior to an adjudication on the merits of the discharge, as a practical matter the employer might not be able to recover the backpay in the event of a favorable decision. *See id.* An employee, on the other hand, would lose little by returning to work without the receipt of accrued backpay, for he would be entitled to recoup it if he ultimately were to prevail on the merits. The rule, however, is predicated on a valid offer of reinstatement because restoring the employee to his *status quo ante* is, in essence, the price the employer is required to pay in exchange for the employee's agreement to return to work before the question of backpay liability is finally settled. As Consolidated's offer would not return Hennessey to the position he occupied before his wrongful discharge, Consolidated has failed to meet its end of the implicit bargain and, therefore, has no claim to its benefits.

In sum, we find that the Board acted well within its authority in enunciating the new rule and that it adequately explained how the rule advances the policies of the Act. Accordingly, we reject Consolidated's contention that the Board acted arbitrarily and capriciously in finding that its backpay liability had not been tolled.

B. Was Consolidated's Offer Conditional and Therefore Invalid?

Consolidated also contends that even assuming the propriety of the new rule, its offer to reinstate Hennessey was unconditional, regardless of the warning letter. Consolidated asserts that had Hennessey accepted the offer, he would have been placed in exactly the same position he had held prior to his discharge, including full seniority rights and benefits, because the warning letter would have had no discernible impact upon his post-reinstatement employment status. More specifically, Consolidated maintains that Hennessey would have continued to have recourse

to the grievance and arbitration procedures in the event of discharge and that, in any event, warning letters are common in the industry. Consolidated then argues that as any adverse effect of the letter is purely speculative, Hennessey should not be excused from his general obligation to mitigate damages by accepting the offer of reinstatement.

Consolidated's suggestion that its offer would have restored the *status quo ante* borders on the frivolous. The filing of the warning letter subjected Hennessey to the risk of summary discharge during a nine-month period, and it is irrelevant that he would have had recourse to grievance and arbitration procedures. Even if one were to concede that the requirement that the letter be filed did not impose an onerous condition, the treatment of the offer as unconditional would be contrary to the Supreme Court's recognition that "[m]aking [employees] whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 197 (1941). "Whole" means whole.

C. Did Consolidated's Offer Toll its Backpay Liability Because Made in Good Faith Reliance on a Binding Arbitration Award?

Consolidated next argues that its good faith reliance on and compliance with a final and binding arbitration award should provide a separate basis for tolling its backpay liability. As Consolidated points out, in our opinion remanding the case we did not reach that argument but nevertheless observed that "resolution of this question depends on whether the Board could properly further the strong national policy in favor of private settlement of labor disputes without abdicating its responsibility to remedy violations of national labor law." *Consolidated Freightways,* 669 F.2d at 798 n.15 We noted that the Board's determination of whether Consolidated's reliance on the arbitration award should toll its backpay liability could turn on the nature of the arbitration committee's decision and the specific circumstances following its issuance, including the facts that "(1) the arbitrator

ordered reinstatement with a warning letter, (2) Consolidated conformed its offer to the terms of the decree and (3) Hennessey waited two and a half months after the decree before filing his charge with the Board." *Id.*

We conclude that the Board acted within its discretion in declining to toll the liability. *See* Supplemental Decision at 7-9. Although the Board may defer to an arbitration award to encourage voluntary settlement of labor disputes and promote collective bargaining, it need not do so where the award is "clearly repugnant to the purposes and policies of the Act." *E.g., Hribar Trucking, Inc.,* 166 N.L.R.B. at 754 (citations omitted). As the Board noted, it had found (in agreement with the ALJ) that the arbitration award was repugnant to the Act and accordingly not entitled to deference. The question of deference, of course, is not before us as Consolidated did not take exception to the ALJ's refusal to defer to the arbitration award. *See Consolidated Freightways,* 669 F.2d at 793 n.6; 29 U.S.C. § 160(e) (1982). Yet, as the Board pointed out, for it to toll Consolidated's backpay obligation because of its compliance with a repugnant award would be tantamount to deference. *See* Supplemental Decision at 8. Consolidated contends that "the strong national policy in favor of private settlement of labor disputes" alone justifies terminating its accrual of backpay liability. The Board, however, could reasonably take the position—even in light of the particular circumstances surrounding the arbitration award—that if it allowed an employee to be penalized for engaging in protected conduct, it would be "abdicating its responsibility to remedy violations of national labor law." *See* 669 F.2d at 798 n.15.

D. Did the Board Permissibly Apply its Rule Retroactively?

Having concluded that the Board acted within its discretion in enunciating the new rule, that Consolidated's offer was conditional and thus invalid, and that its good faith compliance with the arbitration order did not excuse it from its obligations under the Act, we must next decide whether the Board's retroactive application of the rule was permissible. As a general principle,

new rules announced in agency adjudications may be applied retroactively absent any "manifest injustice." *E.g., Clark-Cowlitz Joint Operating Agency v. FERC,* 826 F.2d 1074, 1081 (D.C. Cir. 1987). In considering the equities, courts generally balance the interests of the parties, taking into account such factors as the degree of hardship they will experience, their justifiable reliance on past practices, and the statutory interest in a retroactive application of the new rule. *See, e.g., id.; Tennessee Gas Pipeline Co. v. FERC,* 606 F.2d 1094, 1115, 1116 n.77 (D.C. Cir. 1979), *cert. denied,* 445 U.S. 920 (1980); *Laidlaw Corp. v. N.L.R.B.,* 414 F.2d 99, 107 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

We conclude that the equities in this case support retroactive application of the rule, but only from the date of the ALJ's decision. We find retroactive enforcement of the Board's order warranted because payment of accrued backpay is "a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *Rutter-Rex Mfg. Co.,* 396 U.S. at 265. Here, it is undisputed that Hennessey was disciplined for engaging in protected conduct. Thus there is a strong statutory interest in awarding him full backpay as a remedy for his wrongful discharge. To hold that a conditional reinstatement offer tolled Consolidated's backpay liability would both penalize Hennessey and allow Consolidated to escape the consequences of its own violation of the Act. In such circumstances, it is "not arbitrary and capricious for the Board to conclude that complete vindication of employee rights should take precedence over the employer's reliance on prior Board law." *Laidlaw Corp. v. N.L.R.B.,* 414 F.2d at 107.

On the other hand, we acknowledge that the new rule represents a substantial departure from long-established practice. Under the prior rule, Consolidated's offer would clearly have tolled its backpay liability because it is beyond question that Hennessey rejected it without knowledge of its conditionality. Moreover, the offer was made in good faith reliance on an arbitration award that Consolidated was contractually obligated to obey and that had been issued in a proceeding that the parties agreed

was fair and regular in all respects. Therefore, until the ALJ issued his decision, Consolidated had no reason to question the propriety of its actions. Thereafter, however, Consolidated was on notice that the Board might affirm the new rule, and it could have tolled the accrual of backpay at any time simply by making Hennessey a new, unconditional offer of reinstatement.

E. Did the Board's Delay in Deciding this Case on Remand Violate the APA and Consolidated's Due Process Rights?

Finally, Consolidated argues that the Board's supplemental order should be denied enforcement because of the excessive amount of time (more than six years) that elapsed between our remand and the issuance of the order. According to Consolidated, this "egregious" delay violates section 555(b) of the Administrative Procedure Act, which requires an agency to proceed to conclude a matter presented to it "within a reasonable time." 5 U.S.C. § 555(b) (1982).

In a case involving a lapse of nine years, the Supreme Court held that even a "deplorable" delay does not justify interference with the Board's broad remedial powers, as the "Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Rutter-Rex Mfg. Co.,* 396 U.S. at 265. By refusing to toll Consolidated's backpay liability, the Board reasonably "shifted the cost of the delay" from the employee to the employer. *Cf. id.* at 266. While we do not condone the Board's extraordinary delay, we conclude that enforcement of its order is appropriate because the remedy fashioned by the Board was well within its discretion, and our failure to enforce it would return the burden to the wrong shoulders.

III. CONCLUSION

We hold that the Board acted within its remedial discretion in announcing a new rule designed to require employers who commit unfair labor practices to restore discharge employees to the

status quo ante. In evaluating the equities of applying this principle retroactively, we conclude that Consolidated's backpay liability should accrue only from the date of the ALJ's decision. Accordingly, the petition for review is granted for the sole purpose of modifying the Board's order in accordance with this opinion, and as so modified, the order is enforced.

It is so ordered.

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APPENDIX B

290 NLRB No. 85

SJB
D—6099
Peru, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSOLIDATED FREIGHTWAYS

and **Case 33—CA—4364**

CHARLES HENNESSEY, an Individual

SUPPLEMENTAL DECISION AND ORDER

On January 5, 1981, the Board issued a Decision and Order[1] finding that the Respondent has discharged Charles Hennessey in violation of Section 8(a)(1) of the National Labor Relations Act. Thereafter, the Respondent filed a petition for review and the Board filed a cross-application for enforcement with the United States Court of Appeals for the District of Columbia.

On December 11, 1981, the court remanded the case to the Board to reconsider requiring the Respondent to reinstate Hennessey with backpay.[2] The court held that the Board has failed to consider the significance of Hennessey's motives for refusing reinstatement.

On March 23, 1982, the Board notified the parties that it had decided to accept the court's remand and that they could file a statement of position. Statements have been filed by the General Counsel and the Respondent.

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[1] 253 NLRB 988 (1982).

[2] 669 F.2d 790 (1981).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision of the court in light of the statements of position and makes the following findings:

The background facts, as more fully set out in the judge's decision, may be briefly summarized. The Respondent discharged employee Hennessey for his refusal to drive a tractor-trailer. Based on credited testimony, the judge concluded that Hennessey refused to operate the tractor because it was dangerous and was in violation of safety statutes. Further, the judge found that under the collective-bargaining agreement, Hennessey's refusal constituted protected concerted activity for the purposes of mutual aid and protection and his termination was in violation of Section 8(a)(1).

Approximately 3 weeks after his discharge, Hennessey filed a grievance which was arbitrated pursuant to the collective-bargaining agreement. The arbitrator awarded Hennessey his former job back with full seniority and paid up health and welfare and benefits but no backpay. The award also ordered that a final warning letter be placed in Hennessey's personnel file. The day the arbitration award was announced, the Respondent offered Hennessey reinstatement on its terms. Hennessey rejected the offer.

The judge found that the Repsondent's offer of reinstatement made in accordance with the arbitration award was not valid because the award required that a warning letter be placed in Hennessey's file. The judge, therefore, ordered the Respondent to offer Hennessey reinstatement with backpay.

The Respondent excepted, contending that its offer of reinstatement was adequate because neither the warning letter nor the lack of backpay made the offer conditional. In adopting the judge's decision, the Board, in order to clarify any ambiguity,

stated that the refusal to include accrued backpay in the otherwise valid offer of reinstatement does not render the offer invalid.

In support of its argument that the warning letter did not make the offer invalid, the Repsondent submits that at the time the Respondent's offer was made, Hennessey was not aware that the offer was conditioned on a warning letter being placed in his file.[3] Rather, according to Hennessey's undisputed testimony, his rejection was based on the failure of the reinstatement offer to include backpay. The Respondent contends that because Hennessey did not view the warning letter as an impediment to his return to work, the presence of the warning letter should not void an otherwise valid offer of reinstatement.

The Board agreed with the judge that the Respondent's offer of reinstatement was invalid because placing the warning letter in Hennessey's personnel file as a prerequisite to his reinstatement rendered the offer conditional and therefore inadequate.

On remand, the court has instructed us to explain our rationale for not inquiring into the reasons why Hennessey rejected the Respondent's offer and to reconcile our position with *Research Designing Service*, 141 NLRB 211 (1963); *L. Ronney & Sons Furniture Mfg. Co.*, 97 NLRB 891 (1951), enfd. as modified 206 F.2d 730 (9th Cir. 1953), cert. denied 346 U.S. 937 (1954), and the line of cases holding that the Board will look to the reason why the discriminatee rejects an offer of reinstatement to determine if the offer is valid.

Initially, it is clear that the reinstatement obligation is satisfied only by a valid offer of reinstatement. As stated in *Lipman Bros.*, 164 NLRB 850 (1967), "An employer's offer of reinstatement must be firm, clear, and unconditional." Until such time as a valid offer of reinstatement has been made the discriminatee

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[3] We note that Hennessey was present during the arbitral proceedings. However, Hennessey testified that he had no recollection of being told about the condition.

does not have to make a choice. *Lyman Steel Co.*, 246 NLRB 712 (1979); *Heinrich Motors*, 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968); *Leeding Sales Co.*, 155 NLRB 755 (1965).

As stated in *Craw & Sons*, 244 NLRB 241 (1979):

> However, where the offer of reinstatement has been conditional and has not satisfied the Board's and the court's order of reinstatement, the discriminatees are under no obligation to reply to or to accept such conditional offer of reinstatement.

See also *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980); *Murray Products*, 228 NLRB 268 (1977), enfd. 584 F.2d 934 (9th Cir. 1978).

In the instant case, the offer made by the Respondent was clearly conditional on its face. Hennessey was offered reinstatement pursuant to the arbitrator's award which required that a warning letter be placed in his file. This clearly renders the offer invalid because "a Board order for reinstatement of a discriminatee is designed to place that individual in the same position the individual would have been in had there not been discrimination against him." *Craw & Son*, supra at 242. The placement of the warning letter in Hennessey's personnel file would not have returned him to the position he occupied before the discrimination against him. Instead, he could return to work only under the threat of the letter of warning. This condition made the offer of reinstatement by the Respondent invalid.[4] Hennessey was under no obligation to respond to the offer and we will

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[4] In finding the offer was invalid on its face, it is appropriate to focus on the terms of the offer as required by the arbitration award. Thus, it is not relevant that Hennessey could not recall being informed of the condition at the time the arbitration award was announced.

As explained below, in our discussion of the issue whether the arbitrator's award could properly be deferred to, the letter of warning itself constitutes an interference with Sec. 7 rights. This is so because it

not look into his motivation or reasons for his refusal. We will not allow a discriminatee's response to an offer invalid on its face to "retroactively validate [an offer] which [was] deficient when made." *Murray Products*, 584 F.2d at 942. If, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken.

Those cases cited by the court, i.e., *Research Designing Service* and *L. Ronney*, supra, are distinguishable from the instant case. In *Research Designing*, the judge found that certain offers of reinstatement were invalid because it became apparent after several employees accepted the employer's offers and began working that the offers were in effect conditioned on their working as new employees insofar as seniority and vacation pay were concerned. Because these proved invalid, the judge not only gave a remedy to the employees who had accepted reinstatement, but also declined to cut off the backpay of two other employees who had refused reinstatement offers at the outset for reasons unrelated to the invalid conditions. 141 NLRB at 230. The Board reversed as to the two employees, holding that their refusal of reinstatement for reasons other than the invalid conditions warranted terminating the respondent's liability for reinstatement and backpay when the offers were refused. Id. at 216-217. Although the Board spoke in terms of the two employee's lack of awareness of the invalid conditions, the reinstatement offer, when made, apparently had no invalid conditions attached—unlike the circumstance in the present case where reinstatement was expressly

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(footnote continued from preceding page)

operates as a penalty for the exercise of the right to invoke the protections of a collective-bargaining agreement. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). It can hardly be contended that a reinstatement offer that includes what amounts to an independent violation of the Act is valid offer.

premised on the terms of the arbitration award, which contains the invalid condition.[5]

In regard to *L. Ronney*, we cannot determine, from the Board's decision, whether the offer of reinstatement (to employee Clinton) was valid on its face. The decision speaks of a letter sent to Clinton but does not reveal whether it contained the invalid condition (a requirement that the reinstated employee join an illegally assisted union). 97 NLRB at 892. In any event, assuming arguendo that *L. Ronney* indicates that the Board will examine a discriminatee's reasons for declining a reinstatement offer even when the only offer made is invalid on its face, we overrule it and other similar cases[6] and adhere to the rule of *Craw & Son*, supra, that a reinstatement offer invalid on its face obviates the obligations on the part of a discriminatee to respond and that a discriminatee's refusal of the offer, on whatever

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[5] *Hribar Trucking*, 166 NLRB 745, 756 fn. 19 (1967), modified on other grounds 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 NLRB 601 (1963), enfd. 340 F.2d 607 (1st Cir. 1965), cert. denied 381 U.S. 951 (1965); and *Ekco Products Co.*, 117 NLRB 137 (1957), cited by the court in remanding this case, follow the analysis of *Research Designing*. In our view, critical to all four cases is the fact that the respondents made facially valid offers of reinstatement. The Board looked to the discriminatees' reasons for rejecting those offers to distinguish employees who never learned that illegal conditions were attached to the offer upon implementation from employees who tested the facially valid offers only to discover that they were not, in fact, valid. The Board tolled backpay for the former, who never uncovered the unlawful conditions, but not the latter.

[6] See, e.g., *Atlantic Maintenance Co.*, 134 NLRB 1328, 1329 (1961), enfd. 305 F.2d 604 (3d Cir. 1962), in which the Board found an unlawfully conditioned offer of reinstatement did not toll backpay, but noted, in dictum, that it had not been clearly established that the discriminatees would have rejected a valid offer of employment.

ground, will not relieve the respondent employer of its obligation to make a valid offer in order to toll the running of backpay.

Our requirement that an employer must first extend a facially valid offer of reinstatement before we examine a discriminatee's reasons for declining the offer is fully consistent with the purposes and policies of the Act. The reason is clear: it is the Respondent who acted unlawfully in discharging Hennessey. The equities of the situation fall with Hennessey, the wrongfully discharged employee. It is thus incumbent on the Respondent to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer. Anything short of this is inconsistent with the statutory policy that a transgressor should bear the burden of the consequences stemming from its illegal acts. See *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981), enfd. in part, remanded in part 716 F.2d 1249 (9th Cir. 1982).[7] Because, as noted above, we would require that a discriminatee respond to a facially valid offer and, in those circumstances, would place on him the burden of showing that any refusal of the offer was based on invalid conditions that came to his attention,

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[7] In urging that an unlawfully discharge employee's motive for rejecting an offer of reinstatement should be examined, the Respondent argues that the Board has done so in the past. In support of this petition, the Respondent, in its brief, relies on *Alcan Cable West*, 214 NLRB 236 (1974). While it is correct that the judge, in his decision in *Alcan*, examined the unlawfully discharged employee's reason for rejecting the employer's offer of reinstatement, the Board did not rely on that finding. Rather, the Board found that the employee in question was never offered substantially equivalent employment. Thus, contrary to what the Respondent portrays as the Board's holding in *Alcan*, the Board clearly did not rely on the judge's examination of the discharged employee's reason for rejecting the offer of reinstatement. *Alcan*, 214 NLRB at 237 fn. 3.

we believe that our overall policy respecting responses to reinstatement offers establishes a proper balance between the vindication of Section 7 rights and a discriminatee's duty to mitigate damages.

In footnote 15 of its decision, the court indicated that it need not reach the issue whether the Respondent's good-faith reliance on the arbitrator's award was sufficient, in itself, to toll its backpay liability. The court noted that resolution of this issue depends on whether the Board could properly further the strong national policy in favor of private settlement of labor disputes without abdicating its responsibility to remedy violations of national labor law. The Board has established under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), *Olin Corp.*, 268 NLRB 573 (1984), and their progeny, a policy of deferring to a decision of an arbitrator when (1) the unfair labor practice was presented and considered by the arbitrator, (2) the arbitral proceedings were fair and regular, (3) all parties agreed to be bound, and (4) the decision is not repugnant to the purposes and policies of the Act. The judge in his decision found that the award "fails to remedy the alleged unfair labor practices so as to warrant the Board's deference to such award." No exception was taken to this finding and it was adopted by the Board.

Thus, the Board found here that the arbitrator's award was repugnant to the Act and deferral was not appropriate. If we nonetheless find that the Respondent's backpay obligation was tolled because it complied with the repugnant award, we would, in substantial effect, be deferring to the award.

Certainly, there may be circumstances in which the Board will defer to an arbitrator's award that does not include the same remedy as the Board would require to remedy an unfair labor

practice.[8] However, to defer here to the arbitrator's remedy would permit the Respondent to discipline an employee for activity found by us and the arbitrator to be protected; clearly not an "interpretation consistent with Board policy."[9]

In any event, in this case we have an arbitrator's award that did not warrant deferral. Accordingly, to determine whether the Respondent in these circumstances has tolled its backpay obligation, it is proper to judge the Respondent's offer by the standard the Board normally uses. An award to which deferral was not warranted is completely void.

Here, again, the offer was conditional on its face and thus was not a valid offer to reinstatement. Therefore, the burden of the loss must fall on the Respondent rather than the unlawfully discharged employee. See *Safeway Trails, Inc.*, 233 NLRB 1078 (1977), enfd. 641 F.2d 930 (D.C. Cir. 1979), cert. denied 103 LRRM 2668 (1980). Therefore, as Hennessey did not receive, as we require, a facially valid offer of reinstatement, he is entitled to

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[8] See, e.g., *Combustion Engineering*, 272 NLRB 215 (1984). There the Board noted, "The arbitrator's remedy, though perhaps different from what the Board would have ordered de novo, is reasonably based and is susceptible to an interpretation consistent with Board policy." Id. at 217.

[9] Hypothetically, suppose an arbitrator awarded an employee reinstatement on the condition that the employee not engage in any protected concerted activities? The award would clearly be repugnant to the Act. Surely, an employer's reliance on an offer of reinstatement made pursuant to such an award could not serve to toll an employer's backpay obligation.

full backpay as set forth in the remedy section of our original decision.[10]

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[10] In fn. 16 of its remand, the court noted the Board's willingness in *Abilities & Goodwill, Inc.*, 241 NLRB 327 fn. 5 (1979), and *Marlene Industries Corp.*, 255 NLRB 1446, 1449, fn. 12 (1981), to consider whether an employee would have rejected a valid offer even in the absence of such an offer. Both cases treat the backpay and reinstatement rights of discharged *strikers*. *Abilities & Goodwill*, overruling precedent, determined that discriminatorily discharged strikers should be treated as other dischargees, running the backpay period from the date of the discharge to the date of the respondent's valid offer of reinstatement without requiring the strikers to request reinstatement. In recognition of their status as strikers prior to their discharge, the Board expressly observed that the respondent could reduce or avoid its backpay liability by establishing that the discriminatee would not have accepted the offer if made, or by any other evidence demonstrating a willful loss of earnings. While participation in an unfair labor practice strike does not automatically defeat the right to backpay, it can affect the amount recoverable if the employer can sustain the burden of showing willful loss in that the strike hampered the efforts of the discriminatee to mitigate damages by seeking new employment. *Bon Hennings Logging Co.*, 132 NLRB 97, 99 (1961), enfd. 308 F.2d 548, 558 (9th Cir. 1962); *Ra-Rich Mfg. Corp.*, 120 NLRB 503, 505 (1958), enfd. 276 F.2d 451 (2d Cir. 1960). The willful loss of earning doctrine, available in all backpay determinations, ensures that only actual losses are compensated. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). To the extent these cases also allow an inquiry into a discharged striker's desire for reinstatement prior to receipt of a valid offer, the Board, we think, may properly differentiate in its treatment of backpay between discriminatees whose rights were violated while they were on the job and discriminatees who were withholding their services at the time of their discriminatory discharge.

D—6099

ORDER

The National Labor Relations Board affirms its Decision and Order at 243 NLRB 988 and orders that the Respondent, Consolidated Freightways, Peru, Illinois, its officers, agents, successors, and assigns, shall take the action set forth therein.

Dated, Washington, D.C. July 29, 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1132

CONSOLIDATED FREIGHTWAYS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

CHARLES HENNESSEY, Intervenor

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Argued October 20, 1981

Decided December 11, 1981

Sandra P. Zemm with whom *Zachary D. Fasman* was on the brief for petitioner.

Michael Stein, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Texas *pro hac vice* by special leave of the Court, with whom *Elliott Moore,* Deputy Associate General Counsel, and *Peter Winkler,* Attorney, National Labor Relations Board, were on the brief for respondent.

Arthur L. Fox, II entered an appearance for intervenor.

Before: BAZELON, *Senior Circuit Judge,* and WILKEY and WALD, *Circuit Judges.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge:* Petitioner, Consolidated Freightways ("Consolidated"), seeks review of a decision of the National Labor Relations Board ("NLRB" or "Board"), 253 N.L.R.B. No. 137 (1981), ordering it to reinstate a former employee, Charles Hennessey, with full backpay. Because we find that the Board failed to address petitioner's argument that Hennessey's refusal of a prior reinstatement offer tolled petitioner's backpay liability, we remand for further proceedings.

I. Factual Background

Consolidated discharged Hennessey on March 22, 1979, after Hennessey refused to drive a tractor with faulty lights. Hennessey filed a grievance challenging his discharge. His case was brought before the Joint State Committee ("Committee"), an arbitration committee composed of three members of the union and three representatives of the trucking industry.[1] On May 1, 1979, the Committee ordered that Hennessey be reinstated with full seniority and health and welfare benefits, but with a final warning letter and no backpay. Consolidated proceeded to put Hennessey back on "the board" for work. Joint Appendix ("J.A.") 15. Hennessey, however, did not return to work, explaining to a supervisor that he would not return without backpay, Record ("R.") 61.[2]

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[1] The parties to this action stipulated that the "entire grievance and arbitration procedure was fair and regular in all respects." Joint Appendix (J.A.) 15.

[2] This explanation came several days after Hennessey was told that he had his job back. According to the ALJ's findings, the union steward spoke to Hennessey immediately after the arbitrator rendered its decision, explaining that he could probably resume work that same night. J.A. 15; *see* Record (R.) at 187. Hennessey's testimony, however, indicates that he was somewhat confused about when he could return to work. Although he received two phone calls to return to work between May 1, 1979, the date of the arbitrator's award, and May 4, 1979, Hennessey testified that he expected to receive "something in writing stating [that he] had been reinstated." R. 61. When the Operations

On July 11, 1979, Hennessey filed a charge with the NLRB asserting that he had been discharged for protected concerted activities in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). The Administrative Law Judge (ALJ) refused to defer to the Committee's award,[3] noting that the award "required Hennessey to be reinstated but in effect to be under the gun of a warning letter." J.A. 15. Although the ALJ made no specific findings regarding the effect of a warning letter, his conclusion appears to be based on the terms of the labor agreement between Consolidated and Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. That agreement provides that no employee may be discharged or suspended before receiving at least one warning notice regarding the particular complaint against him. *See* Exhibit 6C-5 at 79-80. The ALJ concluded that a reinstatement offer conditioned on receipt of such a letter failed

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(footnote continued from preceding page)

Manager, Charles Schmalz, phoned Hennessey on May 4 to ask him if he was planning to return to work, this confusion was cleared up. But when asked whether he would resume work, Hennessey stated that he would not, explaining that "under the conditions that I didn't get the money that I deserved . . . I didn't see that I could come back to work." R. 61. Hennessey testified that he then agreed to send in a letter of resignation, but never did so. R. 61. Consolidated subsequently sent Hennessey a letter acknowledging his resignation, to which Hennessey did not respond. R. 262.

[3] The Board's policy of deference to arbitration awards was announced in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). Under *Spielberg,* deference to arbitration awards is justified if three criteria are satisfied: (1) fair and regular arbitral proceedings; (2) the parties agree to be bound by the arbitral award; and (3) the award is not clearly repugnant to the National Labor Relations Act. We have added a fourth requirement: that the statutory issue be congruent with the contractual issue, so that a resolution of one is a resolution of both. *See* Banyard v. N.L.R.B., 505 F.2d 342, 348 (D.C. Cir. 1974).

to remedy the alleged unfair labor practice and that, consequently, the Board need not defer to the arbitrator's award.[4]

On the substantive merits on Hennessey's charge, the ALJ found that Hennessey's refusal to drive the tractor was based on a reasonable belief that to do otherwise would be unsafe under legislatively approved safety standards. Despite the fact that Hennessey was acting alone, the ALJ concluded that absent any evidence that other employees disavowed Hennessey's actions, Hennessey's conduct constituted protected concerted activity,[5] J.A. 13, and his discharge was therefore a violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). J.A. 16. As a remedy, the ALJ ordered that Hennessey be reinstated with full backpay up to the date of a valid offer of reinstatement. J.A. 13. Consolidated appealed to the Board, arguing that its offer of reinstatement following the arbitrators award tolled its backpay liability and discharged its obligation to offer Hennessey reinstatement. The Board sustained the ALJ's order.[6]

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[4] The ALJ suggested that his decision not to defer to the arbitrator's award was based, in part, on its failure to include backpay. J.A. 15. On appeal, the Board agreed that the warning letter placed an invalid condition on reinstatement, but reaffirmed its previous holding that an offer of reinstatement is valid even if it fails to include backpay. J.A. 21. Since we find that the Board should have considered Hennessey's reasons for rejecting Consolidated's offer, we do not reach the question whether the offer was in fact conditional.

[5] Consolidated suggests that our recent decision in Kohls v. N.L.R.B., 629 F.2d 173 (D.C. Cir. 1980), *cert. denied,* 450 U.S. 931 (1981), draws into question the ALJ's determination that Hennessey was engaged in protected concerted activity. Since Consolidated did not take exception to this determination in its appeal to the Board, this question is not before us. *See* 29 U.S.C. § 160(e).

[6] The Board noted that Consolidated did not take exception to the ALJ's refusal to defer to the arbitrator's award or to his ruling that Consolidated had committed an unfair labor practice by discharging Hennessey for engaging in protected concerted activity. J.A. 20.

II. Analysis

Consolidated does not challenge the Board's finding that it violated § 8(a)(1) by discharging Hennessey, Brief for Petitioner 25; nor does it challenge the Board's refusal to defer to the arbitrator's award. *Id.* Instead, Consolidated argues that by offering Hennessey reinstatement in accordance with the terms of the arbitrator's decision it discharged its legal obligation and stopped the accumulation of backpay liability. In addition, Consolidated argues that since Hennessey refused reinstatement for an admittedly invalid reason (the denial of backpay), Hennessey is entitled to neither a second offer of reinstatement nor backpay which might otherwise have accrued after that refusal. In response, the Board argues that Consolidated's offer of reinstatement was invalid because it was conditioned on accepting a final warning letter. Such a letter, it contends, would have subjected Hennessey to continued discrimination for exercising protected rights. Since this offer was invalid, the Board further argues that there is no need to inquire into Hennessey's reasons for refusing to accept it. Finally, the Board contends that the question whether Hennessey refused reinstatement for invalid reasons was not raised before the Board and therefore cannot be raised on appeal.

A. The Issues Before the Board

As an initial matter, we must consider whether Consolidated's argument that Hennessey improperly refused reinstatement is barred by section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). Section 10(e) provides that:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. § 160(e). This section furthers "the salutary policy . . . of affording the Board opportunity to consider on the merits

questions to be urged on review of its order." *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256 (1943). Cases interpreting section 10(e) look to whether a party's exceptions are sufficiently specific to apprise the Board that an issue might be pursued on appeal. Thus, a generalized objection to " 'each and every recommendation' " of an ALJ lacks the particularity needed to preserve objections to the Board's decisions. *Id.* at 255; *see also N.L.R.B. v. Seven Up Bottling Co.*, 344 U.S. 344, 350 (1953) (objection to trial examiner's recommendation as unsupported by evidence and contrary to law does not provide adequate notice). Similarly, a party who has limited his objections before the Board to one issue will not be allowed to raise a different issue on appeal. *See Dallas General Drivers v. N.L.R.B.*, 389 F.2d 553, 555 (D.C. Cir. 1968) (union could not attack standard by which trial examiner determined whether to order reinstatement when objections before the Board were limited to issue of whether employees had been discharged discriminatorily). But when the issues implicated by an imprecisely drafted objection are made evident by the context in which it is raised, section 10(e) does not shield the Board's resolution of those issues from review. *See May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386 n.5 (1945) (vague exception to paragraph including cease and desist order as "not supported or justified by the record" sufficient to preserve issue of the proper scope of that order); *N.L.R.B. v. Blake Construction Co.*, No. 80-1922 (D.C. Cir. August 17, 1981) (objections regarding scope of complaint, substantiality of proof and ALJ's conduct of proceeding adequate to preserve due process objections); *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216, 222 (4th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967) (objection to sufficiency of proof preserved objection to placement of the burden of proof). In each case, the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal.[7]

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[7] The close factual inquiry required by this standard is illustrated by our decision in Burinskas v. N.L.R.B., 357 F.2d 822 (D.C. Cir. 1966). The Board, following remand from this court, had set aside an earlier order and adopted the trial examiner's original recommendations.

In this case, we find that Consolidated's objections before the Board were sufficient to permit it to argue on appeal that Hennessey's improper grounds for refusing reinstatement relieved Consolidated of any obligation to make a subsequent reinstatement offer and, correlatively, tolled Consolidated's backpay liability. In its exceptions to the ALJ's recommendations, Consolidated specifically objected to his failure to find "[t]hat the Charging Party refused the May 1 1979 offer of reinstatement *because* it did not include an offer of backpay. . . . " Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Dated July 30, 1980 3 (emphasis added). In addition, Consolidated discussed Hennessey's grounds for refusing the reinstatement offer in its brief to the Board. It argued that "the fact that the warning letter did not enter into Hennessey's mind when he rejected [Consolidated's] unconditional offer of reinstatement" was "of great significance," and that it was "anomalous" for the ALJ to "void an otherwise valid offer of reinstatement because of what he perceived as a 'condition' to reinstatement

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These recommendations included ordering the employer to reinstate discharged employees with full backpay. The employer then appealed to this court, arguing that its backpay liability should be tolled for the time between the Board's two decisions. The Board countered by arguing, *inter alia,* that the employer had failed to make such a tolling argument before the Board, and was therefore barred from so arguing on appeal. In rejecting the Board's argument, this court first noted that the employer had objected to "the remedy" proposed by the trial examiner in its original objections to the Board. We then turned to the setting in which the Board approved that remedy and observed that there were a number of then recent Board decisions regarding the propriety of tolling backpay liability between inconsistent Board decisions. Finally, we concluded that it was "more likely than not that the Board, with its expert sensitivities alerted by some considerable past familiarity with the tolling issue in this context of a change in litigating fortunes took [the] more limited [backpay] objection to be comprehended within the broader exception." *Id.* at 825. We also noted that the Board's compliance officer had addressed the tolling question in a letter to the employer following the Board's second decision. *Id.* at 825-26.

when that alleged 'condition' (the letter) never entered the mind of the Charging Party when he rejected the offer." *See* Respondent's Brief in Support of its Exceptions to the Decision and Recommended Order of the Administrative Law Judge dated July 30, 1980 16-17.

The Board argues that this discussion was insufficient to satisfy section 10(e) because it appeared as part of Consolidated's argument that its offer was unconditional and was not accompanied by citations to any of the authorities that Consolidated is relying on in this appeal. Brief for Respondent 23. The General Counsel's own brief, however, set the issue of Hennessey's grounds for refusal in the proper context. The General Counsel argued that "the fact that Hennessey declined the offer [should not] relieve [Consolidated] of its obligation to tender a valid offer of reinstatement." Answering Brief in Response to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Dated July 30, 1980 6-7. He then proceeded to quote a recent Board opinion in which the Board ruled that an employer who had been ordered to reinstate certain employees was not excused from that order by letters from these employees " 'to the effect that they did not wish to return to [his] employ.' " *Id. at* 7 (*quoting Leroy W. Craw,* 224 N.L.R.B. 241, 242 (1979), *enf'd,* 622 F.2d 579 (3d Cir. 1980)). In addition, the question whether Hennessey's grounds for refusing Consolidated's offer have any independent legal significance was addressed by the ALJ who stated that:

> Having discharged Hennessey for unlawful reasons, it was and is Respondent's responsibility to remedy the unfair labor practices. The facts indicate that Hennessey made statements indicating that his reason for not going back to work was the lack of backpay in the award. Respondent's liability to reinstate Hennessey, however, continues until a proper offer of reinstatement is made.

J.A. 16. In the light of both Consolidated's emphasis on the significance of Hennessey's grounds for refusing Consolidated's offer, and the ALJ and General Counsel's arguments that those

grounds were of no importance to the disposition of this case, we find that the Board had adequate notice of the issue raised here on appeal.

B. Hennessey's Refusal of Consolidated's Offer

Although the question whether Hennessey improperly refused an offer of reinstatement was before the Board, the Board did not address that question in its opinion, relying instead on the findings and conclusions of the ALJ.[8] The ALJ, however, had simply assumed that Hennessey's reasons for refusing Consolidated's offer were irrelevant to the determination of Consolidated's backpay liability. Consolidated argues that this assumption is not in keeping with Board precedent and that by failing to distinguish or overrule cases that require an inquiry into an employee's grounds for refusing reinstatement, the Board has acted arbitrarily. Because we find that the Board's policy as to unjustified refusals of reinstatement offers remains unexplained, we remand this issue to the Board to reconsider its opinion.

In stating that Hennessey's reasons for not going back to work were of no importance, the ALJ failed to take account of Board precedent that emphasizes the actual reasons why an employee refuses an offer of reinstatement even when the validity of the offer itself is challenged. In *Research Designing Service, Inc.*, 141 N.L.R.B. 211 (1963), for example, an employee who had been unlawfully discharged refused an offer of reinstatement because of the possibility of being laid off once again. *Id.* at 224. The trial examiner nonetheless ordered that the employee be reinstated with full backpay since, had he accepted the offer of reinstatement, he would not have been returned to his former status but would rather have been treated as a new employee for seniority and vacation pay purposes. *Id.* at 230. In reversing this ruling, the Board stressed that the employee "refused the offer of reinstatement *for other reasons.*" *Id.* at 216 (emphasis in original). The

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[8] *See* p. 9 *supra.*

Board therefore ruled that the employer's liability for backpay was tolled by the discharged employee's refusal of an offer of reinstatement.[9] Similarly, in *L. Ronney & Sons Furniture Manufacturing Co.*, 97 N.L.R.B. 891 (1951), *enf'd as modified*, 206 F.2d 730 (9th Cir. 1953), *cert. denied*, 346 U.S. 937 (1954, the Board tolled an employer's backpay liability for a discharged employee who refused reinstatement because she was working at another job.[10] The Board noted that the reinstatement offer was invalid because it was subject to an illegal union-security provision. It nonetheless tolled the employer's backpay liability because it "appear[ed] that [the discharged employee] would not have accepted [the employer's] offer, even had it been unconditional." *Id.* at 892. Other cases pursue this same inquiry into the reasons why a discharged employee rejected an offer of employment, holding that an employer's backpay liability is tolled when an employee rejects an offer of reinstatement without knowledge of the conditionality of the offer. *See, e.g., Hribar Trucking, Inc.*, 166 N.L.R.B. 745, 756 n.19 (1967), *modified on other grounds*, 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enf'd*, 340

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[9] The Board also reversed the trial examiner's order with regard to another employee who had refused reinstatement because "he was working longer hours and making more money at his current job." Research Designing Service, Inc., 141 N.L.R.B. at 210. The trial examiner had not made any specific findings regarding the latter employee's reasons for refusing reinstatement.

[10] With regard to another employee, the Board in *L. Ronney* found that there was sufficient evidence that he would have accepted the employer's offer had it not been conditional. L. Ronney & Sons Furniture Mfg. Co., 97 N.L.R.B. at 893. In support of this ruling, the Board emphasized the employee's "express awareness of the conditional nature of the . . . reinstatement offer." On appeal, the Ninth Circuit found that this portion of the Board's order was not supported by substantial evidence. N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co., 206 F.2d 730, 737-38 (9th Cir. 1958), *cert. denied*, 346 U.S. 937 (1954). Concluding that the "evidence as a whole is inconsistent with the conclusion that [the employee] refused employment on account of the implicit condition in the offer," the court ruled that the employee was only entitled to backpay up until the offer of reinstatement. *Id.* at 738.

F.2d 607 (1st Cir. 1965), *cert. denied*, 381 U.S. 951 (1965); *Ekco Products Co.*, 117 N.L.R.B. 137, 150 (1957).[11] In each case, the issue is whether the evidence clearly establishes that the employee would have turned down the offer of reinstatement even if it had not contained the invalid condition. *See, e.g., Atlantic Maintenance Co.*, 134 N.L.R.B. 1328, 1329 (1961), *enf'd*, 305 F.2d 604 (3d Cir. 1962); *id.* at 1329 n.1 (Member Rodgers, dissenting).

In ignoring the issue of Hennessey's reasons for declining Consolidated's offer, the Board may have relied on a recent case cited in the General Counsel's brief. Brief to the National Labor Relations Board In Answer To Respondent's Exceptions Thereto 7. The question in *Leroy M. Craw*, 244 N.L.R.B. 241 (1979), *enf'd*, 622 F.2d 579 (3d Cir. 1980) was whether a conditional reinstatement offer should be deemed to comply with an order of the Board[12] to reinstate employees who had engaged in an unfair labor practice strike when the employees either failed to respond to the offer or refused it for other reasons. The employer had sent

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[11] Cases involving time conditions also support an inquiry into the employee's reasons for rejecting an offer of reinstatement. Time conditions on acceptance are somewhat different from conditions that go to the nature of an employee's work because they do not prevent the employee, if he accepts in a timely manner, from being made whole. Time conditions are therefore not really conditions on the offer, but rather limitations on the time for acceptance. As such, they must comport with the employee's "fundamental right to a reasonable time to consider whether to return." Penco Enterprises, Inc., 216 NLRB 734, 734-35 (1975). *Accord*, Murray Products, Inc. 228 NLRB 268, 268 (1977), *enf'd*, 584 F.2d 934 (9th Cir. 1978). Nonetheless, the inquiry in such cases is similar to that with invalid conditions on employment—that is, courts look to the reasons why an employee failed to accept the offer of reinstatement within the time imposed by the employer before inquiring into whether that time condition is unreasonable. *See*, N.L.R.B. v. Betts Baking Co., 428 F.2d 156, 158-59 (10th Cir. 1970); N.L.R.B. v. Harrah's Club, 403 F.2d 865, 871 (9th Cir. 1968).

[12] In Leroy W. Craw, 227 N.L.R.B. 601 (1976), *modified on other grounds*, 565 F.2d 1267 (3d Cir. 1977), the Board had held that a company had engaged in an unfair labor practice by not reinstating unfair

out letters offering striking employees reinstatement, but indicating that returning employees would be subject to physical examinations and would only be paid at a substantially equivalent rate to the one they had originally earned. The Board found that both of these conditions were invalid—the physical examinations because they treated returning employees as new employees; and the rate of pay because it failed to include increases in wages that the employees would have received had the employer accepted their offers to return to work at the end of the strike. *Id.* at 242. After determining that the employer's offers of reinstatement were inadequate, the ALJ proceeded to consider whether the employer's backup liability should be tolled in the case of employees who rejected those offers. He concluded that backpay was not tolled, stating that: "[the discharged employees'] replies to the effect that they did not wish to return to Respondent's employ do not obviate the need for Respondent to extend to them an unconditional offer of reinstatement, nor do their replies terminate their backpay periods."[13]

Although *Leroy W. Craw* could signal a change of Board policy abandoning any inquiry into the reasons why a conditional offer is refused, the case might also be reconcilable with earlier Board precedent. The offer in *Leroy W. Craw* plainly stated its invalid conditions and employees who rejected that offer because they had procured "better jobs" might well have gone back to the company if faced with a valid offer. Thus, the ALJ's conclusion may be seen as consistent with an inquiry into whether an employee rejected an offer of reinstatement for reasons other than its invalid conditions.

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labor practice strikers when they unconditionally applied for reinstatement. *Id.* at 609. The Board had therefore ordered the company to offer those employees immediate reinstatement.

[13] On appeal, the Board adopted the findings and conclusions of the Administrative Law Judge. *See* Leroy W. Craw, 244 N.L.R.B. at 241.

In contrast, Hennessey's refusal of Consolidated's offer would seem an appropriate case for applying the rule of *Research Designing* and *L. Ronney*. The testimony regarding Hennessey's reason for refusing Consolidated's offer was uncontradicted; he would not return without backpay. R. 61. That reason was not valid under Board precedent because it violated Hennessey's duty to mitigate his damages. *See National Screen Products Co.*, 147 N.L.R.B. 746, 748 (1964). On the other hand, while Hennessey was present when the presumably invalid condition on his reinstatement—the final warning letter—was announced, R. 99, 184, Hennessey testified that he had no recollection of being told about that condition, R. 100, and did not learn about it until five weeks later.[14] Id. There is therefore no reason to believe that the

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[14] This testimony was given during questioning by the ALJ:

> Judge Stone: . . . As best you can [,] tell me exactly what [the Joint State Committee] told you the results of the grievance hearing were?
>
> Hennessey: Well, sir, they told me that the discharge had been overturned. That the pay claim had been denied. The company was responsible to pick up my pension and health and welfare benefits with full seniority rights.
>
> Judge Stone: Now, was there anything else said to you at all?
>
> Hennessey: No, sir, not that I remember.
>
> Judge Stone: Did they give you anything in writing?
>
> Hennessey: No, sir. I picked up a copy of the results of the grievance about five weeks later. And it was at that time when I finally realized there had also been a thing where the discharge had been reduced to a final warning letter.
>
> Judge Stone: . . . Now, did you know at the time the grievance hearing was over, when you were orally told, did you know at that time there was anything about a warning?
>
> Hennessey: No sir, I did not.

R. 99-100.

The ALJ did not make any findings regarding Hennessey's awareness of the final warning letter, presumably because of his conclusion that Hennessey's reason for refusing Consolidated's offer of reinstatement were of no importance.

invalid condition on Consolidated's offer even entered Hennessey's mind when he decided to turn down the offer of reinstatement. Looking to the actual reasons why Consolidated's offer was refused seems especially appropriate when there is every indication that Consolidated acted in good faith.[15] Unlike the employer

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[15] Consolidated also argues that its good faith reliance on the arbitration award provides an independent basis for overturning the Board's decision. It suggests that even in cases in which the Board properly refuses to defer to an arbitrator's award, the Board should nonetheless look to the award to determine the interim rights of the parties. Thus, it argues, Hennessey should have been required to accept employment as conditioned by the arbitrator's decree, even though the Board ultimately ruled that the arbitrator's award contained an illegal condition.

Because we are remanding this case to the Board to reconsider the significance of Hennessey's motives for refusing Consolidated's offer, we need not reach the question whether Consolidated's good faith reliance on the arbitrator's decree, in itself, would be sufficient to toll backpay liability. We note, however, that resolution of this question depends on whether the Board could properly further the strong national policy in favor of private settlement of labor disputes without abdicating its responsibility to remedy violations of national labor law. *See* Local Union No. 2188, International Bth'd of Elec. Workers v. N.L.R.B., 494 F.2d 1087, 1091 (D.C. Cir., *cert. denied,* 419 U.S. 835 (1974); Associated Press v. N.L.R.B., 492 F.2d 662, 667 (D.C. Cir. 1974). Thus, the Board might well reach different conclusions regarding the employer's right to rely on an arbitrator's decree pending a Board decision on a charged unfair labor practice depending on the nature of the arbitrator's decision and the specific circumstances following its issuance. In this case, among the significant factors the Board would have to consider are (1) the arbitrator ordered reinstatement with a warning letter, (2) Consolidated conformed its offer to the terms of the decree and (3) Hennessey waited two and a half months after the decree before filing his charge with the Board. Although Hennessey filed his charge within the statutory period of six months, and the Board ruled that the offer was improperly conditioned, a more refined consideration of the policy in favor of private settlement might lead the Board to find that Consolidated's good faith reliance on the arbitrator's award should work to suspend its backpay liability. Different considerations would of course be implicated if the arbitrator's award had been plainly conditioned on

in *Leroy W. Craw,* who made a conditional offer of reinstatement in violation of an express order from the Board, Consolidated offered Hennessey reinstatement in accordance with the terms of the arbitrator's decree; no Board precedent at that juncture specifically held that this offer would be inadequate; and Hennessey gave no indication that the warning letter bore any significance in his decision not to return to work. It was only after Hennessey filed his charge with the Board, which was several months after the arbitrator's decision, that Consolidated received notice that the warning letter presented any problem at all.

In view of the Board's failure to reconcile its decision in this case with its precedent, and its failure to explain its reasons for abandoning any inquiry into the reasons why a conditional offer is refused, we have no choice but to remand this case to the Board to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is proper.[16] *See generally Road Sprinkler Fitters Local*

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a surrender of the employee's statutory rights, or if the arbitrator had upheld the discharge, thereby requiring no reinstatement offer at all. In these cases, the Board might find that allowing the arbitration award to reduce the remedy received by a wrongfully discharged employee would seriously compromise the remedial purposes of the Act.

[16] We are especially hesitant to decide this question without the benefit of the Board's reasoning in the light of contradictory signals from the Board regarding the analogous situation in which an employer who has made no reinstatement offer at all seeks to reduce his backpay liability by proving that an offer would have been rejected. *Compare* Roadway Express, Inc., 254 N.L.R.B. No. 26, 48–49 (1981) (evidence that employee intended to quit does not obviate need for a valid offer of reinstatement) *and* Lyman Steel Co., 246 N.L.R.B. 712, 715 (1979) (employer must make a genuine offer of reinstatement to toll backpay liability) *with* Marlene Industries Corp., 255 N.L.R.B. No. 192, 14 n.12 (1981) (even in the absence of an offer of reinstatement, employer may reduce liability by demonstrating that employee would not have accepted the offer if made) *and* Abilities & Goodwill, Inc., 241 N.L.R.B. 27, 27 n.5, *enf. denied on other grounds,* 612 F.2d 6 (1st Cir. 1979 (same).

No. 669 v. *N.L.R.B.*, 600 F.2d 918, 923 (D.C. Cir. 1979); *N.L.R.B.* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1326 (D.C. Cir. 1972); *Burinskas* v. *N.L.R.B.*, 357 F.2d 822, 827 (D.C. Cir. 1966).

Remanded.

APPENDIX D

253 NLRB No. 137

FJZ
D—7248
Peru, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSOLIDATED FREIGHTWAYS

and Case 33—CA—4364

CHARLES HENNESSEY, an Individual

DECISION AND ORDER

On July 30, 1980, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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[1] In adopting the Administrative Law Judge's finding that Charles Hennessey was discharged in violation of Sec. 8(a)(1) of the Act, we note that no exceptions were filed to that finding, or to the further finding that deference to the arbitration award concerning Hennessey's discharge was unwarranted.

In his Decision, the Administrative Law Judge intimated that Respondent's refusal to include backpay in its offer of reinstatement to Charles Hennessey, by itself, could render the offer of reinstatement inadequate. While a valid offer of reinstatement must be specific, unequivocal, and unconditional, the refusal to include accrued backpay in an otherwise valid offer of reinstatement does not render the offer inadequate. The imposition of such a requirement would nullify the right to litigate the lawfulness of the discharge. *Moro Motors Ltd.*, 216 NLRB 192 (1975), and *National Screen Products Co.*, 147 NLRB 746 (1964). Therefore, insofar as Respondent's offer of reinstatement to Hennessey did not include accrued backpay, it was not, for that reason, invalid.

However, we agree with the Administrative Law Judge that Respondent's offer of reinstatement was invalid. In so doing, we rely on the Administrative Law Judge's finding that placement of a warning letter in Hennessey's personnel file as a prerequisite to his reinstatement renders the reinstatement offer conditional and, thus, inadequate.

D—7248

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Consolidated Freightways, Peru, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. January 5, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

D—7248

APPENDIX

[SEAL] NOTICE TO EMPLOYEES [SEAL]

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

WE WILL NOT threaten employees with discharge or other reprisals because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL offer to Charles Hennessey immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him

whole, with interest, for any loss of pay or other benefits suffered by reason of the discrimination against him.

CONSOLIDATED FREIGHTWAYS

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

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APPENDIX E

JD—447—80
Peru, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSOLIDATED FREIGHTWAYS

and **Case No. 33—CA—4364**

CHARLES HENNESSEY

Gary W. Wright, Esq., and
Lynn E. Gilfillan, Esq.,
for the General Counsel.
Mr. Charles Hennessey, of
Warrenville, IL, Pro Se.
Sandra P. Zemm, Esq., and
John W. Powers, Esq.
(*Seyfarth, Shaw, Fairweather and Geraldson*), of Chicago,
IL, for the Respondent.

DECISION

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on February 14 and 15, 1980, at Peoria, Illinois.

The charge was filed on July 11, 1979. The complaint in this matter was issued on August 30, 1979. The principal issues concern whether the Respondent has violated Section 8(a)(1) of the

Act by threatening an employee concerning his exercise of protected concerted rights, and by discharging Charles Hennessey on March 22, 1979, because he engaged in protected concerted activity. There are also issues as to whether the Board should defer its right to act and honor an arbitration award and whether Respondent's willingness to reinstate and "act of reinstatement" of Hennessey constitutes a bar to reinstatement and a toll to backpay.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer

The facts herein are based upon the pleadings and admissions therein.

Consolidated Freightways, the Respondent, is, and has been at all times material herein, a Delaware corporation with corporate headquarters located at Menlo Park, California, and terminal facilities located at Peru, Illinois, and at other sites throughout the United States. It is engaged in the business of intrastate and interstate transportation of goods and materials.

Respondent, during a representative 12-month period, derived gross revenues in excess of $50,000 from transporting material from points outside the State of Illinois directly to points within the State of Illinois. Respondent, during the same representative period, derived gross revenues in excess of $50,000 from transporting material from the State of Illinois directly to points located outside the State of Illinois.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved[1]

Local Union 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Preliminary Issues Supervisory Status[2]

At all times material herein, the following-named persons occupied the positions set opposite their respective names, and have been, and are now, agents of the Respondent at its Peru, Illinois facility, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

William Jones	—	Mechanics Shop Supervisor
Robert Tosch[3]	—	Dispatch Supervisor
Charles Schmalz	—	Dispatch Operations Manager

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[1] The facts are based upon the pleadings and admissions therein.

[2] The facts are based upon the pleadings and admissions therein and undisputed credited evidence.

[3] According to the pleadings and the record otherwise, the correct spelling of Dispatch Supervisor Robert Tosch's name is "Tosh." Respondent's brief refers to the dispatcher as "Tosch." Reference to "Tosh" herein is to Tosh or Tosch, whichever is the correct spelling of the individual's name. Since Respondent should be more aware of the spelling of its supervisor's name, I shall use "Tosch" in reference to Tosh or Tosch.

B. Background

Consolidated Freightways, Inc., the Respondent, is and has been for a number of years engaged in the business of intrastate and interstate transportation of goods and materials. Respondent opened a terminal at Peru, Illinois, in March of 1979.

At all times material herein Respondent had a collective-bargaining relationship with Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Said bargaining relationship was governed by contracts, one of which had the following provisions:

* * *

ARTICLE 16

EQUIPMENT, ACCIDENTS, REPORTS. The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified. All equipment which is refused because not mechanically sound or properly equipped, shall be appropriately tagged so that it cannot be used by other drivers until the maintenance department has adjusted the complaint. After equipment is repaired the Employer shall place on such equipment an "OK" in a conspicuous place so the driver can see the same.

Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or

equipment. The term "dangerous conditions of work" does not relate to the type of cargo which is hauled or handled.

Any employee involved in any accident shall immediately report said accident and any physical injury sustained. When required by his Employer, the employee, before starting his next shift, shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident. The employee shall receive a copy of the accident report that he submits to his Employer. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

Employees shall immediately, or at the end of their shift, report all defects of equipment. Such reports shall be made on a suitable form furnished by the Employer and shall be made in multiple copies, one copy to be retained by the employee. The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical departments.

When the occasion arises where an employee gives written report on forms in use by the Employer of a vehicle being in an unsafe working or operating condition, and receives no consideration from the Employer, he shall take the matter up with the officers of the Union who will take the matter up with the Employer.

If the Employer requests a regular employee to qualify on equipment requiring a special license or in the event an employee is required to qualify (recognizing seniority) on such equipment in order to obtain a better job opportunity, with his Employer, the Employer shall allow such regular

employee the use of the equipment in order to take the examination.

All equipment used as City Peddle trucks and equipment regularly assigned to peddle runs must have steps or other similar device to enable drivers to get in and out of the body.

The Employer shall install heaters and defrosters on all trucks and tractors.

There shall be first line tires on steering axle of road units.

All new road equipment regularly assigned to the fleet after July 1, 1973 shall be equipped with air-ride seats on the driver's side.

Newly manufactured over-the-road tractors which are added to the road fleet, subsequent to April 1, 1977, and assigned to road operations on a regular basis shall be air conditioned. The National Negotiating Committees shall designate an Employer-Union Committee which shall undertake to determine the feasibility of converting road tractors to provide air conditioning by April 1, 1980.

The Conference Joint Area Committee may, upon application of either the Employer or the Local Union, waive the installation of such air conditioning equipment as a result of climatic conditions or other standards established by the Committee.

The Employer and the Union together shall create a joint committee of qualified representatives for the purpose of consulting among themselves and with appropriate Government agencies, state and federal, on matters involving highway and equipment safety, and such committee shall meet

on a quarterly basis with a schedule to be agreed to by the respective chairmen.

Any complaint arising under this article will be processed through the Conference Area level in accordance with rules and procedures to be agreed upon between the parties. Within sixty (60) days from the signing of this agreement, the Local Union will notify the Employer of the representative who will be responsible for these matters.

* * *

The Respondent's operations were also subject to Federal Motor Carrier Safety Regulations as prescribed by U.S. Department of Transportation Federal Highway Administration. At all times material herein, such regulations included as part thereof the following regulation:

* * *

Sec. 392.7 Equipment, inspection and use.

No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

Service brakes, including trailer brake connections.
Parking (hand) brake.
Steering mechanism.
Lighting devices and reflectors.
Tires.
Horn.
Windshield wiper or wipers.
Rear-vision mirror or mirrors.
Coupling devices.

* * *

Charles Hennessey was employed by the Respondent as a transport operator from May 19, 1977, to March 22, 1979. Respondent's discharge of Hennessey on March 22, 1979, is in issue as an alleged violation of Section 8(a)(1) of the Act. The essential question is whether Respondent discharged Hennessey because of his protected concerted activity.

Hennessey refused to drive a tractor-trailer on March 22, 1979, assertedly because the lights were not of such a nature as to be safe. It is clear that if Hennessey's refusal to operate or drive the tractor-trailer constituted protected concerted activity, such March 22, 1979, discharge would constitute conduct by Respondent violative of the Act.

At first blush, the General Counsel's pleadings merely asserted that Respondent's discharge of Hennessey was because of Hennessey's protected concerted activity. Such pleadings are loose enough to allow litigation of whether Hennessey was discharged because of protected concerted activity other than the activity on March 22, 1979. In this respect, I note that the General Counsel adduced evidence toward establishing that Hennessey had engaged in other protected concerted activity, that of refusing to drive tractor-trailers which were overloaded as regards state weight regulations, that Respondent's agents had made remarks to Hennessey revealing an attitude of discriminatory motivation as regards employees who refused to drive overloaded trucks, and in effect displeasure with Hennessey because of his refusal. The Respondent objected to the receipt of such evidence and argued that the issues were narrow and related to the question of safety of the truck on March 22, 1979. The General Counsel cleared up any ambiguity in the pleadings and stated in effect that the evidence of the refusal to drive overweighted tractor-trailers was "relevant" to show the conduct alleged in this case as regards the issue of discharge for driving an unsafe tractor. I have carefully reviewed the record and General Counsel's brief. It is clear that

the issue as litigated is simply whether the Respondent discharged Hennessey on March 22, 1979, for his refusal to drive a tractor-trailer on March 22, 1979, and whether such refusal, because of safety reasons, constituted protected concerted activity under the Act.

The tractor which was involved in Hennessey's refusal to drive a tractor on March 22, 1979, had a problem relating to its lights or battery on March 21, 1979. As a result, a new battery was installed in such vehicle on March 21, 1979.

C. The Events of March 22,1979[4] The Discharge of Hennessey

The dispatcher called Charles Hennessey at approximately 10 p.m. on the evening of March 21 for a run to Springfield,

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[4] The facts are based upon a composite of the exhibits and the credited aspects of the testimony of Hennessey, Pole, Lentz, Klinker, Tosch, Lincoln, and Jones. I credit Hennessey's testimony over Jones' as regards Hennessey's initially seeing Jones and completing a cry card, and as regards Jones' telling Hennessey that the battery in the truck would fully charge itself by Hennessey's driving the tractor for a hundred miles or so. I also credit Hennessey's testimony over Tosch's as to whether Tosch refused to inspect the tractor. First Hennessey's testimony appeared sincere, frank, and consistent. There appears little reason for either Hennessey or Jones or Tosch to present different versions as to how the complaint was initially presented. Considering Jones' examination of the battery without a detailed check or test, the possibility of erratic shorts, the contradictory testimony relating to whether or not the alternator would engage without drainage of electrical current when voltage was between 12 and 12.5 volts, and the fact that Jones did not know that a new battery had been installed that date, I am persuaded that Jones believed the battery was good and would charge up. However, I am not persuaded that Jones knew that the battery was in such a condition that it needed to be at a charging state for only about 5 minutes. Rather, I am persuaded that he has

Missouri, which Hennessey accepted. Hennessey arrived at the terminal at about 12:30 a.m. on March 22, picked up his paperwork and went to the coffee room to fill out his logs. In checking his logs, he determined that he did not have a sufficient number of driving hours available to take the Springfield run. Hennessey thereupon switched runs with a driver scheduled to go to Des Moines, Iowa. Hennessey and the other driver exchanged paperwork and Hennessey returned to the coffee room to fill out the paperwork for the run to Des Moines. Tractor No. 16-3281 had been assigned or reassigned to the Des Moines run.

As Hennessey approached Tractor No. 16-3281, he noticed that it was idling, but that no lights were visible. He then got into the cab and saw that the headlight and taillight switches were both in the "on" position. Hennessey then turned on the dome light switch and the four way flasher switch, but still there were no lights visible on the tractor or the tandem trailers. Hennessey began to accelerate the engine. After he revved the engine for a brief period of time he noticed the lights begin to appear, and after a brief period of time the lights came up to normal brightness. After doing this, he took his foot off the accelerator, and all

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(footnote continued from preceding page)

rationalized such beliefs upon an after the event discovery that a new battery had been installed. As to Tosch's testimony concerning his inspection of Hennessey's tractor, I noted a hesitation and a "I believe" reference in his testimony. I do not credit his testimony that he and Hennessey inspected the tractor. I note that both the General Counsel and Respondent in their briefs have presented statements of contended facts which excellently describe many of the facts. I have considered such statements of contended facts as proposed findings of facts and as to many of the findings of facts herein have accepted some of the same as is or with modification as my findings of facts, all however dependent upon my own evaluation of evidence and consistent with what my findings of facts would have been even without the literary aid of the parties.

of the lights on both the tractor and trailers went out. Hennessey then got out of the unit and noticed a vendor-mechanic working nearby. He asked the vendor-mechanic if there were something the mechanic could do to repair the unit. The mechanic stated that all the unit needed, in his opinion, was a new battery, and that Hennessey should go to the maintenance office and notify them of the unit's condition.[5]

Hennessey went to the maintenance office and spoke with Bill Jones, the maintenance coordinator at the Peru terminal. Hennessey explained the condition of the unit, and Jones instructed him to complete a vehicle condition report describing the problem. After completing the vehicle condition report and giving it to Jones, Hennessey was instructed to go to the coffee room where he would be called when the unit was ready. Jones then proceeded to the tractor to personally inspect it. In order to determine whether the charging system was functioning properly, he throttled the engine. Jones throttled the engine just enough to raise it to over the 1200 rpm limit. As soon as he did that, he heard the relay in the charging circuit click.

Upon Jones' throttling of the engine over 1200 rpms, various lights commenced to come on.[6] Jones noticed that there was mud

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[5] Respondent's questioning of Hennessey and other witnesses appeared to be designed to attack Hennessey's credibility as to whether the lights came on immediately or went off immediately, depending upon whether the engine was being revved. I am persuaded that Hennessey was a truthful witness, that all witnesses to the proceeding appeared to have an enlarged view of time span because of the nature of the events, that the overall facts reveal that some lights having a lesser need for current went out first and came on last depending upon the revving of the engine above 1200 rpms. The usage of terms *immediately*, etc., in the context of facts herein must be viewed as a relative term.

[6] I do not credit Jones' testimony to the effect that all lights were on when he approached the vehicle. Such credibility resolution is based

on the headlight lenses and that the lights appeared brighter when such mud was removed.

Hennessey returned to the coffee room, where he had coffee and talked with three drivers that he recognized—Ray Lentz, Bud Pole, and George Klinker. After about 10 minutes, and as he was talking with the three drivers, Hennessey saw Jones enter the coffee room and go to the coffee machine. Hennessey asked Jones if the truck had been fixed. Jones replied that it was ready to go. Hennessey then asked Jones if the unit had been replaced. Jones stated that it hadn't—that it didn't need repair. Jones said that all Hennessey had to do was run the unit for a hundred miles or so, and that would charge the battery.

Hennessey then reminded Jones that the trailers on the unit contained a placard load (a placard load being one in which dangerous material requires special markings to be displayed and wherein special operating procedures must be followed). Hennessey again asked Jones if he would fix it, and Jones replied that he wouldn't—that Hennessey should run it. Jones then said that if Hennessey wanted anything done about it, he would have to go to the dispatch office.

Jones proceeded to the maintenance area, where he called the dispatch office and informed Bob Tosch, assistant dispatch operations manager, that a driver who wanted the battery in his truck changed was on his way to the dispatch office. At that time, Jones told Tosch that there was nothing wrong with the truck—it was mechanically sound and the charging system was in good working order. He explained that a low charge in the battery was causing some dimness, but that if Hennessey would drive the truck, the battery would be recharged.

(footnote continued from preceding page)

upon consideration of Hennessey's credited testimony and the logical consistency of facts.

After his discussion with Jones, Hennessey went to the dispatch office and spoke to Robert Tosch, a dispatch supervisor at the Peru terminal. Hennessey explained the condition of the unit to Tosch, at which time Tosch replied that Bill Jones had already told him about the unit, and that Jones had final say in the matter. Hennessey then told Tosch that the unit was unsafe in that condition, and reminded him that it was a placard load, and that it was foggy outside. Tosch stated that there was nothing he could do. Hennessey replied that he could not drive the unit in that condition. Tosch told Hennessey to take it the way it was or to go home.

After this exchange, Hennessey then returned to Tractor No. 16-3281 and inspected it a second time. As Hennessey approached the unit, he again found it idling with no lights on the tractor or trailers visible. Hennessey got into the cab and saw that all of the light switches were in the "on" position, but that no lights were visible. Hennessey then revved the unit at a high speed for a brief time, when he noticed the lights come on. Hennessey continued running the engine for a brief time, then he took his foot off the accelerator. When he let off the accelerator, all of the lights went out. With the tractor still idling and the light switches turned on, Hennessey left the cab and inspected the unit. He again found that no lights were visible on the truck—no lights were visible on the tandem trailers.

After Hennessey's second inspection of his unit, he returned to the dispatch office and spoke with Robert Tosch and Rich Bryant, another dispatcher on duty that night. Hennessey asked Tosch and Bryant to check the vehicle with him. They both refused. Hennessey told Tosch and Bryant that the unit was unsafe, and that he couldn't drive it in its present condition. He then asked Tosch and Bryant if they would swap tractors for him. Hennessey was refused, and then informed that the final decision regarding the condition of the unit rested with Bill Jones, and that Tosch and Bryant could do nothing about it. Hennessey

again reminded Bryant that his unit was a placard load, and that it was foggy outside. Hennessey asked Bryant if he would call the Respondent's safety supervisor to look at the unit. Bryant stated that he would not call the safety supervisor, in that he had been instructed not to bother him with matters like that.[7]

At this point, Tosch told Hennessey to take the unit the way it was or punch out and go home. To this Hennessey stated that he didn't want to go home—that he wanted the unit repaired. Tosch again said that there was nothing he could do, that either Hennessey take the unit as it was or the Company would accept his voluntary resignation.

After this discussion, Hennessey filled out his paysheet, explaining what had happened and the time involved. After completing the paysheet, Hennessey then punched out, turned in his bills and paysheet and left the dispatch office.

After leaving the dispatch office, Hennessey proceeded to the coffee room, where he again spoke with drivers Lentz, Pole and Klinker. Hennessey asked the three drivers if they would come out and look at the unit assigned to him. They agreed to do so, and the group then proceeded into the yard with Hennessey. As they approached the unit, Hennessey pointed out the unit, and explained that he had left the light switches on. The unit was idling, and no lights on either the tractor or trailers were visible. Hennessey then got into the cab, and began revving the engine. After a brief period of time the lights began to come on and to reach normal brightness. When the lights came to their normal brightness, Hennessey let off the accelerator and all of the lights went out. Hennessey got out of the cab and discussed the problem with Lentz, Pole and Klinker. He asked each of them what they would do. Lentz, Pole and Klinker each said that they would not take the unit out in the condition it was in.

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[7] As has been indicated, I do not credit Tosch's testimony inconsistent with the facts as found.

After this conversation, the three drivers returned to the coffee room, and Hennessey completed a second vehicle condition report which he placed in a slot in the driver's door of the cab. Following this, Hennessey left the terminal.

In addition to the above facts, evidence was presented relating to the condition of the tractor earlier in time on March 21, 1980. Thus, the facts reveal that there was a problem concerning "lights" and that such problem resulted in the installation of a new battery. The testimonial evidence of Lincoln revealed that he considered the battery that was installed to be one in good shape. It is noted, however, that the indicated amperage reading, which although within acceptable limits, was not at the highest preferred reading.

Further the facts reveal that after the discharge of Hennessey, around 4:30 a.m. to 5 a.m., an employee serviced Tractor No. 16-3281 and left with said tractor around 5 a.m. for a trip to Des Moines. Such driver found that the lights were not on at first but came on when the engine was throttled. Said driver used a bar to keep the accelerator pedal down and revving the engine during time of servicing. Around 5 a.m., as indicated, the driver took the tractor to Des Moines, Iowa, without mishap.

CONCLUSION[8]

The essential issue is whether Hennessey's conduct in refusing to drive Tractor No. 16-3281 constituted conduct of protected concerted activity. If so, it is clear that Respondent's discharge of Hennessey on March 22, 1979, constituted conduct violative of Section 8(a)(1) of the Act.

Considering the facts in this case, I am persuaded and conclude that Hennessey's refusal to operate or drive Tractor

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[8] As later set forth, I find that the arbitration award, concerning a grievance about Hennessey's discharge, should not be honored.

No. 16-3281, on March 22, 1979, was based upon a reasonable belief that to operate or drive such tractor under the existing conditions was dangerous and could result in an accident and be violative of safety statutes, and that under the collective-bargaining agreement in existence that he could not be required to drive such tractor.[9] The determination upon the reasonableness of his belief must be based upon the circumstances as they existed and not upon whether in fact there actually existed such danger. Thus, the facts reveal that the night was foggy and that Hennessey, if he drove the tractor, would have to drive the same for 4 or 5 hours during darkness of night or early morning. The facts also reveal that the load that Hennessey was taking was a placard load requiring some stops and checking of the load and vehicle. Hennessey's experience with the lights on the morning of March 22, 1979, revealed that when the engine was not being revved, as would be the case at times when the vehicle was stopped for any purpose including the times for checking the load and vehicle, the lights dimmed and/or went out. If the lights dimmed or went out during the time of darkness when Hennessey went on his trip, an obvious condition of danger and safety would exist. It may be that the condition of the battery was of such a nature that upon a slight amount of driving time, any problem as to lights would have been eliminated. This, however, is a factor beyond Hennessey's knowledge. Further, as indicated, Jones had told Hennessey that the condition would solve itself by the driving of the tractor a hundred miles or so. As noted, Jones testified to the effect that he knew the condition of the lights would have been solved by the driving of the tractor for about 5 minutes. I do not believe or credit Jones' testimony to such effect. Rather, if such were the case, I find it hard to believe

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[9] The principles involved in this case are the same as considered in *United States Stove Co.*, 245 NLRB No. 183. Applying such principles and the reasoning thereto as related to the specific facts in this case, it is clear that Hennessey's refusal to operate the tractor on March 22, 1979, constituted protected concerted activity.

that Jones would have wasted more time than 5 minutes to go to talk to Hennessey when the problem could have been solved by 5 minutes of revving the engine.

As set forth above, Hennessey had a reasonable belief that the operation of the tractor under the existing conditions was dangerous. The question then presented is whether Hennessey's complaint and refusal to operate the tractor because of asserted dangerous conditions constituted concerted activities for the purposes of mutual aid and protection.

It is clear that employees have a common concern to work in safe conditions and not to be required to work in unsafe conditions. The Federal government and many states have enacted occupational safety legislation.

The Board in *Alleluia Cushion Co., Inc.*, 221 NLRB 999 at page 1000, discussed the question of concerted activities for mutual aid and protection as related to employee actions related to OSHA rights as follows:

* * *

> Section 7 provides that employees have the right to engage in concerted activities for the purpose of mutual aid and protection. Henley's filing of the complaint with the California OSHA office was an action taken in furtherance of guaranteeing Respondent's employees their rights under the California Occupational Safety and Health Act. It would be incongruous with the public policy enunciated in such occupational safety legislation (i.e., to provide safe and healthful working conditions and to preserve and nation's human resources) to presume that, absent an outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees

have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

* * *

In *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 at page 1217, the Board discussed its decision in *Alleluia* and said, "A correct reading of the case is that activity will be deemed concerted if it relates to a matter of common concern and this common concern will be found with respect to violations of a safety statute which created a general hazard for employees."

Considering the principles of *Alleluia*, the fact that Hennessey's complaint and refusal to operate the tractor on March 22, 1979, was based upon a reasonable belief that the operating of the tractor was under unsafe and dangerous conditions, the fact that the type of safety conditions involved is covered by legislation and regulations pertaining thereto, it must be found, in the absence of employee disavowal that Hennessey was acting on their behalf, that Hennessey's activity in complaining and refusing to operate or drive the tractor constituted concerted activity[10]

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[10] As indicated in the *Diagnostic Center Hospital Corp.* case, Hennessey's activities are deemed concerted because the matter was a matter of common concern to employees. Fonseca's action in taking the tractor out the next morning is not sufficient to overcome a presumption that Hennessey was acting on behalf of other employees who would not have wanted to drive for a number of hours at nighttime in possible unsafe conditions.

in nature relating to a matter of common concern.[11] Thus, I conclude and find that Hennessey's activities in complaining about and refusing to operate the tractor on March 22, 1979, because he believed it to be dangerous to do so and so expressed, constituted concerted activities for the purposes of mutual aid and protection and is protected by the Act. The facts reveal that Hennessey was discharged for such complaints and refusal to drive and operate the tractor under conditions he reasonably believed dangerous. Accordingly, it is concluded and found that the discharge of Hennessey for his protected concerted activities is violative of Section 8(a)(1) of the Act. Similarly, Tosch's statements relating to a "voluntary resignation," as set forth beforehand, constituted a threat of discharge for the exercise of a protected concerted right and was violative of Section 8(a)(1) of the Act.

D. The Grievance, Arbitration, and Related Events

Hennessey filed a grievance on April 14, 1979, under the collective-bargaining agreement signed by the Respondent and the Union. The grievance, which alleged that Hennessey did not resign his employment, requested reinstatement with full backpay and health and welfare. A hearing was held on May 1, 1979, before the Joint State Committee[12] at which both company

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[11] As indicated in the *Diagnostic Center Hospital Corp.* case, the matter of safety violations covered in legislation are deemed to be a matter of common concern to employees.

[12] The Joint State Committee is the arbiter of disputes arising under the collective-bargaining agreement signed by the Company and the Union. The Committee is composed of six members, three representatives from trucking companies and three representatives from the Union. This Committee is defined and set out in the collective-bargaining agreement signed by the Respondent and the International Brotherhood of Teamsters, the Union representing Hennessey.

and union representatives[13] appeared and presented their respective cases. John Kelly, a union business agent, Gene Wade, Hennessey's union steward, and Hennessey each made a statement in support of Hennessey's grievance for reinstatement and backpay. Charles Schmalz, the dispatch operations manager, made a statement on behalf of the Company's position.

In the instant unfair labor practice proceeding, counsel for Respondent and the General Counsel stipulated that the grievance filed by Hennessey was covered by the labor agreement between Respondent and the Union; that the Respondent, the Union and the Charging Party agreed to be bound by the decision of the Joint State Committee; that the Joint State Committee did render a decision; and, that the entire grievance and arbitration procedure was fair and regular in all respects. The parties also stipulated that the question of whether or not Tractor No. 16-3281 was, in fact, safe on March 22 was discussed and presented to the Committee.

The Joint State Committee rendered its decision, after hearing the arguments of both parties, awarding the Charging Party his former job back with full seniority and paid up health and welfare benefits, but with no backpay. At that time, the Joint State Committee also ordered that a "final warning letter" be placed in Hennessey's personnel file.[14] Immediately after the announcement of this decision, Wade, the union steward, explained to the Charging Party that, as of that moment, he had his job back and that he could probably go out on a run that very night.

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[13] Present at this arbitration were: Hennessey, John Kelly, union business agent, and Gene Wade, union steward; Charles Schmalz appeared for the Respondent.

[14] Upon hearing the Committee's decision, Schmalz called his office to inform them of the outcome. He informed the dispatcher to put Hennessey back on the "board." As of 6 p.m. on May 1, 1979, Hennessey was on the "board."

Conclusion

Upon consideration of the issues presented and the determination and award, it would not effectuate the purposes of the Act for the Board to honor the arbitration award concerning Hennessey's grievance as to his March 22, 1980, discharge. The grievance-arbitration determination and award appears to be neither fish nor fowl. Rather, it appears to be a Solomon type split decision. Thus, the award in effect required Hennessey to be reinstated but in effect to be under the gun of a "warning letter." Further, the award left Hennessey with a loss of backpay for his period of unemployment. Under such circumstances it is clear that the award fails to remedy the alleged unfair labor practices so as to warrant the Board's deference to such award.

Further, although Respondent took steps in compliance with such award, Respondent at no time reinstated Hennessey in such a manner as to constitute full reinstatement to his former job. There is no evidence or contention that Respondent reinstated Hennessey in such a way as to avoid the liability of discharge as a result of the "warning letter," a part of the award. Nor is there any evidence or contention that Respondent ever notified the Union or Hennessey that it was unconditionally reinstating Hennessey without the placement of a "warning letter" in his personnel file. Having discharged Hennessey for unlawful reasons, it was and is Respondent's responsibility to remedy the unfair labor practices. The facts indicate that Hennessey made statements indicating that his reason for not going back to work for Respondent was the lack of backpay in the award. Respondent's liability to reinstate Hennessey, however, continues until a proper offer of reinstatement is made. And backpay is not tolled until a valid reinstatement offer is made even though an employee might be willing to be reinstated under unlawful conditions or in ignorance of unlawful conditions. To hold otherwise would as a matter of policy encourage continued resistance by

Respondent to observance of requirements concerning remedying of or cessation of unfair labor practices.

In sum, the facts do not reveal that Respondent has taken proper steps of reinstatement or action to toll backpay so as to limit remedial requirements set forth later herein.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.[15]

It having been found that the Respondent discharged Charles Hennessey on March 22, 1979, in violation of Section 8(a)(1) of the Act, the recommended Order will provide that Respondent offer him reinstatement to his job, and make him whole for loss of earnings or other benefits within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977),[16]

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[15] The circumstances of the discharge of Hennessey do not reveal in my opinion a general proclivity to violate the National Labor Relations Act. Such does not warrant a broad cease and desist order. Nor do the facts otherwise reveal that a broad cease and desist order is warranted.

[16] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

except as specifically modified by the wording of such recommended Order.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Consolidated Freightways, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union 710, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Charles Hennessey and by other acts Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and Respondent has thereby engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[17]

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[17] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Consolidated Freightways, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

(b) Threatening employees with discharge and other reprisals because of their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Charles Hennessey immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority, or other rights previously enjoyed, and make him whole for any loss of pay or other benefits suffered by reason of the discrimination against him in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at Respondent's facility at Peru, Illinois, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 33, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 33, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

Dated, Washington, D.C. July 30, 1980

Jerry B. Stone
Administrative Law Judge

[18] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD—447—80

APPENDIX

[SEAL] **NOTICE TO EMPLOYEES** [SEAL]

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL offer to Charles Hennessey immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights previously enjoyed, and make him whole for any loss of pay or other benefits suffered by reason of the discrimination against him.

WE WILL NOT discharge or otherwise discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

WE WILL NOT threaten employees with discharge or other reprisals because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such

rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

CONSOLIDATED FREIGHTWAYS

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower — 16th Floor, 411 Hamilton Avenue, Peoria, Illinois 61602, Telephone (309) 671-7068.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1630 September Term, 1989

CONSOLIDATED FREIGHTWAYS,
Petitioner

v.

NATIONAL LABOR
RELATIONS BOARD
Respondent

BEFORE: Wald, Chief Judge, Buckley and Sentelle, Circuit Judges

O R D E R

Upon consideration of Petitioner's Petition for Rehearing, filed February 12, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1630 September Term, 1989

CONSOLIDATED FREIGHTWAYS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX G

NATIONAL LABOR RELATIONS ACT, Section 10(c), 29 U.S.C. 160(c): Reduction of Testimony to writing; findings and Orders of Board

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The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any

back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

The full, corporate name of Petitioner is Consolidated Freightways Corporation of Delaware ("CFCD"). Petitioner is a wholly-owned subsidiary of Consolidated Freightways, Inc. ("CFI"), its parent company.

The following is a non-wholly-owned subsidiary of CFCD:

Consolidadora De Fletes Mexico, S.A. De C.V.

The following are non-wholly-owned subsidiaries of CFI, or of its wholly-owned subsidiaries, as indicated in parentheses:

Centron, LTD (Bermuda) (CFI)

Purolator Insurance Company, LTD (Bermuda) (a non-wholly-owned subsidiary of Purolator Courier Corporation, which is a wholly-owned subsidiary of Emery Air Freight Corporation ("EAFC"), which is a wholly-owned subsidiary of CFI).

Emery Custom Brokers, LTD (U.K.) (a non-wholly-owned subsidiary of EAFC).

Emery Air Freight S.r.l. (Italy) (a non-wholly-owned subsidiary of EAFC).

E.O.F. Hong Kong Limited (CFI)

Emery Custom Brokers N.V. (Belgium) (a non-wholly-owned subsidiary of Emery Distribution Systems, Inc. ("EDS"), which is a wholly-owned subsidiary of EAFC).

Emery Custom Brokers Pty. LTD. (Australia) (a non-wholly-owned subsidiary of EDS).

Bradley Facilities, Inc. (a non-wholly-owned subsidiary of EAFC, co-owned with Eastern Airlines, Flying Tiger Line, Inc., American Airlines and Air Express International Corporation).

CF Air Freight (France) (a non-wholly-owned subsidiary of CF International Holdings Corporation

("CFIHC"), which is a wholly-owned subsidiary of CFI).

CF Air Freight (Hong Kong), Limited (a non-wholly-owned subsidiary of CFIHC).

CF Air Freight Pty., Limited (Australia) (a non-wholly-owned subsidiary of CFIHC).

CF Ocean Service (Taiwan) Limited (CFIHC; majority shareholder is Albert Shaw).

CF Ocean Service Pty. Limited (Australia) (a non-wholly-owned subsidiary of CFIHC).